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No.

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. WALID A. HINDO,

Petitioner,

vs.

UNIVERSITY OF HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL AND FINCH UNIVERSITY OF HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The first issue is whether the knowing submission of inflated invoices for salaries and benefits of radiology residents by the University to the Veterans Administration Medical Center North Chicago constitutes a violation of the False Claims Act, 31 U.S.C. § 3729(a) and 31 U.S.C. § 3729(b).

The second issue which is related to the first is what effect a conflict of interest has on false claims liability where the Chief of Staff at the VA North Chicago, who was also paid by the University, with no apparent duties at the University, approves the invoices for payment at the VA, knowing that the bills were inflated with amounts due for radiology residents that did not receive prior funding approval from the Veterans Administration Central Office.

The last issue is whether the District Court erred by ruling that all the Relator's claims were barred by *res judicata*. The District Court concluded retaliatory discharge under state law and an action for "whistleblower protection" under 31 U.S.C. § 3730(h) were the same cause of action with a common core of operative facts.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

A. Summary of Proceedings 3

B. Relevant Facts 5

i. The Relator 5

ii. Relationship Between UHS/CMS And The VAMCNC 6

iii. The Disbursement Agreement Between UHS/CMS And The VAMCNC 7

iv. The Approval Process For Residents Through VACO 8

v. The Invoices From UHS/CMS To The VAMCNC 8

Contents

	Page
Reasons for Granting the Writ	9
I. The Legislative History Of The False Claims Act Of 1986, The Recent Case Law, The Plain Language Of The Statute And The Supreme Court's Intention To Broadly Construe The False Claims Act All Mandate That The Knowing Submission Of Inflated Bills To A Government Agency Creates False Claim Liability.	11
II. The Conflict Of Interest Of Dr. Gary Almy Who Worked For Both The UHS/CMS As Associate Dean For Veterans Affairs And For The VAMCNC As Chief Of Staff Should Make The VHS/CMS More Culpable Under The False Claims Act.	19
A. Government Knowledge Of UHS/CMS False Statements Is No Defense.	22
B. No Damages Are Necessary For UHS/CMS To Be Liable Under The Act.	22
III. All Relator's Claims Should Not Be Barred And Dismissed By *Res Judicata* Since "Retaliatory Discharge" Under State Law And An Action For "Whistleblower Protection" Under 31 U.S.C. § 3730(h) Are Different Causes Of Action Based Upon Separate And Distinct Facts And Actions Of UHS/CMS.	23
Conclusion	28

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Abbott Labs v. Portland Retail Druggists Ass'n, 425 U.S. 1 (1976) 10

Fleming v. United States, 336 F.2d 475 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965) 22

Heckler v. Community Health Services, 467 U.S. 51 (1984) 10, 20, 21

Herrmann v. Cencom Cable Associates, Inc., 999 F.2d 223 (7th Cir. 1993) 26, 27

Neal v. Honeywell, 33 F.3d 860 (7th Cir. 1994) 26, 27

Torres v. Rebarchak, 814 F.2d 1219 (7th Cir. 1987) 24

United States v. Erlich, 643 F.2d 634 (9th Cir. 1981) 22

United States v. Hill, 676 F. Supp. 1158 (N.D. Fla. 1987) . 15

United States v. Jackson, 845 F.2d 880 (9th Cir. 1988) ... 18, 19

United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 153 (9th Cir. 1991) 10, 20, 22

Young Montenay Inc. v. United States, 15 F.3d 1040 (Fed. Cir. 1994) 10, 12, 13

Contents

Page

Statutes Cited:

18 U.S.C. § 209 21

18 U.S.C. § 209(a) 2, 22

28 U.S.C. § 1254(1) 2

31 U.S.C. § 3729 3

31 U.S.C. § 3729(a) .....i, 2, 12, 13, 14

31 U.S.C. § 3729(b) .....i, 2, 14, 15

31 U.S.C. § 3730(h) .....i, 2, 3, 4, 5, 23, 24, 26, 27

31 U.S.C. § 3739(b) 10

Rules Cited:

Federal Rule of Civil Procedure 12(b)(6) 4

Federal Rule of Civil Procedure 52(c) 4

Other Authority Cited:

Senate Report No. 345, 99th Cong., 2nd Session, reprinted in 1986 U.S.C.C.A.N. 5266-5299 .....10, 11, 13, 14, 15, 24

Contents

Page

APPENDIX

Appendix A — Opinion of the Court of Appeals for the Seventh Circuit Reported as *United States ex rel. Walid A. Hindo v. University Health Sciences: The Chicago Medical School (1995)* Dated September 6, 1995 ..... 1a

Appendix B — District Court Ruling: Judge Grady's Finding of Fact and Conclusions of Law Rendered at the End of Plaintiff's Case Dated November 29, 1994 .... 15a

Appendix C — Judgment in a Civil Case Form AO 450 Entered November 29, 1994 ..... 19a

Appendix D — Minute Order of November 29, 1994 Granting Defendant's Motion for Judgment at the Close of Plaintiff's Case, Docketed by the Clerk on December 1, 1994 ..... 20a

Appendix E — Minute Order of November 29, 1994 Entering Judgment for Defendant Docketed by the Clerk on November 30, 1994 ..... 21a

Appendix F — Minute Order of November 3, 1993 Denying Plaintiff Leave to File Its Second Amended Complaint 22a

Appendix G — Minute Order of December 7, 1993 Entering Memorandum Opinion: Defendant's Motion to Dismiss Is Granted 24a

Contents

Page

Appendix H — Memorandum Opinion Dated December 7, 1993 Granting Defendant's Motion to Dismiss the Relator's 3730(h) Claims 26a

Appendix I — Plaintiff's Second Amended Complaint .. 30a

Appendix J — Stipulations of Fact 42a

Appendix K — Trial Exhibit 162 — VA Paid Invoices for Fourth Quarter 1990 Paid by VA on November 16, 1990 (Omitted here but submitted separately as Lodging Appendix) 47a

Appendix L — First Amended Complaint Filed January 30, 1991 in the Circuit Court of Lake County — Retaliatory Discharge 48a

Appendix M — Trial Exhibit 33: Letter Dated July 31, 1990 from Peter Regan at the VA Central Office in Washington D.C. to the Relator Walid A. Hindo 57a

Appendix N — Trial Exhibit 66: Letter Dated July 9, 1990 from David Barton at the VA North Chicago to John Gantz at the UHS/CMS with a Bill of Collection Attached 59a

Appendix O — Trial Exhibit 35: Letter from Walid A. Hindo, the Relator to Edwin Derwinski Dated June 22, 1990 ..... 61a

Contents

Page

Appendix P — Trial Exhibit 70: Letter from David E. Barton at the VA North Chicago to John Gantz at UHS/ CMS Dated November 15, 1990 Suspending Payments to the University for Radiology Residents 65a

Appendix Q — Text of Pertinent Statutes 67a

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *United States ex rel. Walid A. Hindo v. University Health Sciences: The Chicago Medical School,* 65 F.3d 608 (7th Cir. 1995) and is reprinted in the Appendix A, pages la to 14a. The decision of the United States District Court for the Northern

District of Illinois, Eastern Division, reviewed by the Seventh Circuit was not reported. Excerpts of Judge Grady's District Court decision are reprinted in the Appendix B, pages 15a to 18a. The memorandum opinion entered on December 7,1993 granting defendant's motion to dismiss Count III whistleblower, 31 U.S.C. § 3730 (h) claims is reprinted in the Appendix H as pages 26a to 29a. This memorandum decision was not reported.

STATEMENT OF JURISDICTION

The Seventh Circuit decided this case on September 6, 1995. (App. A). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutory authorities are pertinent to this cause:

> Title 31 U.S.C. § 3729(a) and (b). False Claims
>
> Title 31 U.S.C. § 3730(h) — Whistleblower Protection
>
> Title 18 U.S.C. § 209(a) Salary of Government officials and employees payable only by United States

(The full text of these statues are reprinted in the *Text of Pertinent Statutes* in the Appendix Q pages 67a to 69a.)

STATEMENT OF THE CASE

A. Summary of Proceedings

On March 8, 1991, a two count complaint was filed by the Relator, Walid A. Hindo, against University of Health Sciences: The Chicago Medical School and the Relator amended the complaint on the day of trial to include Finch University of Health Sciences: The Chicago Medical School, since the defendant changed its name (hereinafter collectively "UHS/CMS"). The complaint alleges damages on behalf of the United States based upon violations of the False Claims Act, 31 U.S.C. § 3729. The first count of the complaint alleged violations of the False Claims Act for improperly billing the Veterans Administration, during the academic year 1989-1990, for two radiology residents without funding authorization through the Veterans Administration Central Office (hereinafter "VACO"). The second count of the complaint alleged that UHS/CMS filled out false time cards for these radiology residents, when they were not present for VA duty at the Veterans Administration Medical Center North Chicago (hereinafter "VAMCNC") as scheduled.

On July 29, 1993, the plaintiff filed a first amended complaint, adding a count three for violations of the "whistleblower protection" provisions of the False Claims Act, 31 U.S.C. § 3730(h). On November 3, 1993, plaintiff requested leave to file a second amended complaint adding additional allegations for violations of 31 U.S.C. § 3730(h). On November 3, 1993 Judge Grady entered a minute order denying plaintiff's motion for leave to file his second amended complaint. (A copy of the second amended complaint is included in the Appendix I, pages 30a to 41a; a copy of the minute order is included in the Appendix F page 22a to 23a). On December 7, 1993, Judge Grady dismissed count three of plaintiff's first amended complaint. (Appendix G, minute order on pages 24a to 25a and Appendix H, memorandum opinion, pages 26a to 29a).

In its memorandum opinion, the District Court concluded *all* of plaintiff's allegations for violation of the "whistleblower" provisions of the False Claims Act contained in the first amended complaint and the second amended complaint were barred by *res judicata*. (Appendix H, page 29a, n. 1) The court reasoned that a retaliatory discharge case filed by plaintiff in the Circuit Court of Lake County on January 30, 1991 was the same cause of action as count three of the first amended complaint, which contained plaintiff's § 3730(h) claims. The state court complaint is included in Appendix L (pages 48a to 56a).

On November 21, 1994, trial of this case began with both parties entering into certain stipulations of fact. The stipulations of fact are set forth in Appendix J to this brief (pages 42a to 46a). Plaintiff voluntarily dismissed count two of the complaint and elected to proceed at trial solely on the facts alleged in count one of the complaint. On the first day of trial after opening statements were made, Judge Grady interrupted the trial, making a Rule 12(b)(6) motion to dismiss *sua sponte* for failure to state a claim. (Trial Record Transcript (hereinafter "Tr.") Tr. p. 45).

The judge instructed counsel to research the issue of what is a false statement under the Act and return with the results of that research the next day at 10:00 A.M.. On November 22, 1994, the parties returned to court and argued whether or not there were false statements contained in the invoices. After hearing arguments the court proceeded to try the case under Rule 52(c). (Tr. pp. 69-70). On November 29, 1994, after hearing plaintiff's case, Judge Grady entered judgment on defendant's motion pursuant to Rule 52(c). (Appendix D, page 20a). This order was docketed by the clerk on December 1, 1994. On November 29, 1994, Judge Grady entered a minute order that the bench trial ends with judgment entered in favor of UHS/CMS. This order was docketed November 30, 1994. (Appendix E, page 21a). On the same day Judge Grady entered judgment on form AO450. (Appendix C, page 19a).

The Seventh Circuit affirmed. It held there was nothing false in the invoices and the University was merely negligent when they invoiced the VA Medical Center for the radiology resident salaries and therefore there was not a violation under the False Claims Act. (Appendix A, page 10a). Additionally, the Seventh Circuit held all of the Relator's whistleblower claims under § 3730(h) were barred by *res judicata*.

B. Relevant Facts

i. The Relator

Walid A. Hindo, M.D., the Relator in this case, is a tenured member of the University's (UHS/CMS) faculty . In 1989, and for part of 1990, he was the chairperson of the University's Department of Radiology. During the same time, he was also on the staff of the VAMCNC. (Appendix J, page 42a, Stipulation of Facts, hereinafter "Stip.", no.1 p.1). The Relator was also the chief of the Radiology Service at VANCMC. (Trial Exh. 35).

On June 22, 1990, prior to the completion of the academic year complained of in this case, the Relator wrote to Edwin Derwinski at the Veterans Administration in Washington D.C., complaining of radiology resident fraud by agents of UHS/CMS. (Appendix O, pages 61a to 64a, also Trial Exh. 35). On July 9, 1990, in direct response to Hindo's letter alleging radiology resident fraud, the Chief of Fiscal Services, David Barton, sent a bill of collection in the amount of $45,801.88 to John Gantz, Vice President of Finance at UHS/CMS, for amounts wrongfully paid to UHS/CMS for the radiology residents who were not approved for funding through VACO. (*See* Appendix N, page 59a; Tr. p. 371; Trial Exh. 33, the bill is attached to Regan's letter). On July 31, 1990, Peter Regan, at the Veterans Administration, Washington D.C. wrote Dr. Hindo thanking him for his concerns. He said:

> Your recent letter to Secretary Derwinski concerning a potential problem area at the North Chicago V.A. Medical Center has been referred to me for reply. I appreciated learning about the possibility this facility has reimbursed the affiliated Medical Schools inappropriately for two Radiology Residents. As you may be aware, *your concern has already led the facility to re-examine its records for academic year 1989-1990.*

(*See* Appendix M, pages 57a to 58a and Trial Exh. 33 with bill of collection from Barton attached).

On August 1, 1990, the Relator was stripped of his Chairmanship at the University. The Dean of UHS/CMS, Marshall Falk, and the VAMCNC hospital director, Leonard Rogers, also conspired to have him terminated at the VAMCNC by submitting false resignation documents to VACO. Additionally, there were many other acts of retaliation and harassment pled in the second amended complaint. (Appendix I, second amended complaint, Count III, 35a to 41a).

In just a few short months, Dr. Hindo suffered a substantial loss of income, status, prestige, emotional distress, embarrassment and humiliation as a result of the June 22, 1990 letter he wrote to VACO. (Appendix J, second amended complaint, 39a). All of these facts occurred because Dr. Hindo blew the whistle on UHS/CMS for submitting false claims with respect to radiology residents at the VAMCNC.

ii. Relationship Between UHS/CMS And The VAMCNC

The University is an Illinois not-for-profit corporation which operates a medical school located in North Chicago,

Illinois adjacent to the VAMCNC. The University operates various residency training programs with many residents in those programs rotating through the VAMCNC. Stip., Appendix J, no. 2, 42a). Evidence of this relationship was set forth in written form on May 10, 1974 in a formal "Affiliation Agreement." (Trial Exh. 1). Pursuant to this agreement, under paragraph one, UHS/CMS was responsible for organizing a Deans Committee. The purpose of the Deans Committee was to serve as a liason between the University and the VAMCNC. (*See* defendant's trial brief, page two). The Deans Committee was to be composed of senior members of the faculty from UHS/CMS.

iii. The Disbursement Agreement Between UHS/CMS And The VAMCNC

To allocate their respective responsibilities for the salary of resident positions, *that were approved for funding by VACO*, and rotated through the VAMCNC, UHS/CMS and the VAMCNC entered into a disbursement agreement for House Staff Stipends and Fringe Benefits effective July 1,1987 through June 30,1991. (Trial Exh. 2). The disbursement agreement permitted UHS/CMS to bill in two steps. (Trial Exh. 2, Section 8). First, they would bill 80% of the estimated charges for each quarter, in advance.

The second step in the billing process was the final payments. (Trial Exh. 2, page 2, Section 8(a)). To obtain final payment, the University had to submit an invoice to the VAMCNC containing the name of each resident rotating through the VAMCNC during the calendar quarter, the program level (number of years of training for each resident, the appropriate daily charge for each resident, the total amount due for each house staff member, the total charge, and the number of "VA duty days" completed by each resident) (Trial Exh.2, Section 8).

In this case the University did not bill for the radiology

residents in the estimated billings. Rather, they billed for the total radiology resident cost (100%) when the final invoices were submitted. (Trial Exh. 95, estimated bills are attached to the letter, Tr. p. 69 and paid quarterly invoices Trial Exhs. 159-162). There is no provision in the disbursement agreement for payment in this manner. (Trial Exh. 2). There is also no provision in the disbursement agreement for payment of residents that were not approved for funding by VACO. (Trial Exh. 2).

iv. The Approval Process For Residents Through VACO

In the late summer of 1988, each Department Chairman at UHS/CMS and the Service Chiefs at the VAMCNC estimated the number of residents they needed at the VAMCNC for the upcoming academic year starting July 1, 1989. (Trial Exh. 22). The VAMCNC would submit a request for the total needed by the VAMCNC to the Central Office (VACO) in Washington D.C. asking for funding for the total number of residents requested. *The request submitted included a request for funding two radiology residents.* (Trial Exhs. 10 and 11).

On October 12, 1988, the VA Central Office advised VAMCNC that it would receive funding for 53.5 residency positions for the 1989-1990 academic year. (Trial Exh. 10, Stip., Appendix J, page 43a). *This did not include funding for the two radiology residents sought by the VAMCNC.* (Trial Exh. 10, Stip., Appendix J, page 43a). The final allocation for residents for the academic year 1989-1990 remained at 53.5. This was stipulated to during the trial. (Tr. pp. 125, Tr. p. 126).

v. The Invoices From UHS/CMS To The VAMCNC

The final invoices that were prepared each month and submitted to the VAMCNC by UHS/CMS are Joint Trial Exhibits 54-65, and the final invoices actually paid out by the VA are Trial

Exhibits 159-162. There were 23 separate entries claiming amounts due for radiology residents. *Id.* All of the residents included on these invoices were part of the 53.5 allocation of resident positions approved for funding by the Veterans Administration Central Office for the academic year 1989-1990, except for the radiology residents. (Tr. pp. 107, 183).

All of the residents approved by VACO had their yearly salary, daily rate and fringe benefits calculated pursuant to the appendix to the disbursement agreement. (Trial Exh. 2, Tr. p. 138). The radiology residents who did not receive funding authorization through VACO also had their yearly salary, daily rate and fringe benefits calculated pursuant to the appendix to the disbursement agreement even though the trial testimony indicated the disbursement agreement did not apply to residents who were not funded through VACO. (Trial Exhs. 54-65, invoices and Tr. pp. 137, 191, 291, 292, and 255).

The VAMCNC paid these invoices on a quarterly basis. (Trial Exhs. 159-162). The first three quarters of bills for the academic year 1989-1990 were paid by the VAMCNC on May 30, 1990. (Trial Exhs. 159-161). The invoices were revised by the UHS/CMS on April 2, 1990. (Trial Exhs. 54-65). The last quarter of monthly bills for the academic year 1989-1990, from UHS/CMS were paid by the VAMCNC on November 16, 1990. (Appendix K and Trial Exh. 162). The paid fourth quarter invoices are mistakenly labeled third quarter by the VAMCNC. (*See* Appendix K, cover sheet, and Trial Exh. 162).

REASONS FOR GRANTING THE WRIT

There are many compelling reasons for granting this petition:

1. There are important public policy considerations at stake

in this case. The modern False Claims Act is intended to protect the treasury from contractors who knowingly submit inflated bills to the government. (Senate Report No. 345, 99th Cong., 2nd Session, reprinted in 1986 U.S.C.C.A.N. 5266 at 5272 and 5285, hereinafter "Sen. Rep.") If the act does not deter contractors from this type of conduct then it is the treasury which suffers and therefore the citizens of the United States who ultimately bear the financial burden.

2. Historically, courts have interpreted the False Claims Act in a restrictive manner. The legislature was very critical of these restrictive court decisions such as those made by the Seventh Circuit and the District Court in this case that are based upon narrow interpretations of the act. (Sen. Rep. 5271 and 5272). *This Court must act to reverse restrictive interpretations of the False Claims Act that are contrary to the express legislative intent.*

3. False claims liability can be established without skullduggery or fraudulent motive. The Seventh Circuit and District Court decisions seem to indicate these are necessary criteria. The False Claims Amendment Act of 1986 specifically amended 31 U.S.C. § 3739(b) to provide "No specific intent to defraud is required."

4. The decision is contrary to the trend of the post 1986 false claims cases which more liberally construes the False Claims Act. *See Young Montenay Inc. v. United States,* 15 F.3d 1040 (Fed. Cir. 1994) *and United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 153 (9th Cir. 1991). Additionally, the lower court decision conflicts with this Court's decisions in *Abbott Labs v. Portland Retail Druggists Ass'n,* 425 U.S. 1, at 12 (1976) and *Heckler v. Community Health Services,* 467 U.S. 51 at 63 (1984).

I.

THE LEGISLATIVE HISTORY OF THE FALSE CLAIMS ACT OF 1986, THE RECENT CASE LAW, THE PLAIN LANGUAGE OF THE STATUTE AND THE SUPREME COURT'S INTENTION TO BROADLY CONSTRUE THE FALSE CLAIMS ACT ALL MANDATE THAT THE KNOWING SUBMISSION OF INFLATED BILLS TO A GOVERNMENT AGENCY CREATES FALSE CLAIM LIABILITY.

This case is one of exceptional importance because the False Claims Act as amended was specifically designed to find liability where contractors knowingly submit false inflated bills to government agencies. The legislative history states, "But the committee does believe the civil False Claims Act should recognize that those doing business with the government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." (Sen. Rep. at 5272). Additionally, the legislative history states that, "contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek." (Sen. Rep. at 5285). The legislative history goes further to define this obligation as "to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of this claim. Only those who act in gross negligence of this duty will be found liable under the False Claims Act." (Sen. Rep. at 5285).

In this case UHS/CMS breached this duty under the False Claims Act, with any kind of effort the University could have easily discerned there were no amounts due for the radiology residents and therefore should not have billed for their services. First, the controller could have reviewed the estimated bills. They did not include amounts due for radiology residents. (Trial Exh.

95). Second, UHS/CMS could have had some internal accounting controls whereby they matched the residents' bills against positions approved for funding by VACO. UHS/CMS billed the VAMCNC for the radiology residents without regard to the accuracy of the bills and the VAMCNC relied on these bills in making payments to the defendant. It is not the government's responsibility to make outside contractors have adequate internal controls in accordance with generally accepted accounting standards or to check the accuracy of the contractor's bills.

The Seventh Circuit opinion was in part based upon the fact that UHS/CMS expected funds for these radiology residents to become available and they relied on VAMCNC statements that funding may be authorized at some point in the future, even though it was getting close to the end of the academic year. In short, that the VAMCNC never told them flatly that they would not receive funding for these two radiology resident positions.

The trend of case law is clear that contractors must bill on the basis of current information available at the time they submit the invoices and not a chance of future funding or cost being greater in the future. *Young-Montenay, Inc., v. United States,* 15 F.3d 1040 (Fed Cir. 1994). At the time UHS/CMS submitted the invoices in this case it is stipulated they knew there was no funding for these positions. This knowledge and the trend in the law prohibits UHS/CMS from asserting the possibility of funding in the future relieves them of liability under the False Claims Act. UHS/CMS had to bill the VAMCNC based upon information known to them at the time they billed. When they billed VAMCNC and requested funds for the radiology residents those invoices contained false statements and constituted a false record under 31 U.S.C. § 3729(a).

The inflated bill or more specifically in this case the entries for amounts due and owing when there is nothing owed for

radiology residents are the false statements under § 3729(a) in this case. The legislative history concurs with this analysis. It states, "Each separate bill, voucher or other '*False Payment Demand*' constitutes a separate claim for which a forfeiture shall be imposed." (Sen.Rep. at 5274, page 9).

When considering whether the information in the invoices for radiology residents during the academic year of 1989-1990 are false as a matter of law the court must consider whether the representations are objectively true. To consider whether or not the representations contained in the invoices are objectively true the court must consider the knowledge the defendant had at the time the University submitted the invoices to the Veterans Administration. *Young-Montenay, supra.*

In the Stipulations of Fact entered into prior to trial in Appendix J, page 43a, it provides as follows:

> 7. On October 12, 1988, the VA Central Office advised NCVAMC that it would receive funding for 53.5 residency positions for the 1989-1990 academic year. (Joint Exhibit 10.) This did not include funding for the two radiology residents sought by the NCVAMC (North Chicago Veterans Administration Medical Center or "VAMCNC" hereunder).

It was also a stipulated fact at trial that the University knew the 53.5 residency positions approved for funding by VACO represented the final allocation for the academic year 1989-1990 and this allocation was never increased or changed to include the radiology residents at issue in this case. (Trial Transcript "Tr" pp. 125-126). It was also a stipulated fact at trial that the University knew the radiology residents never received funding from VACO

(Tr. pp. 78, 79, 126, 128, 132, 133, 135, 136, 198, 217). Now in light of the stipulated knowledge that UHS/CMS had with respect to the lack of funding for these positions, and the stipulated fact that if they did not receive funding there would be nothing owed by the VA North Chicago, it can not be said there were no false statements in the invoices under § 3729(a), because the claims for payment were not objectively true. These claims were false as a matter of law.

Section 3729(b) of the False Claims Act was amended in 1986 to specifically provide "*No specific intent to defraud is required.*" Some courts, like the Seventh Circuit and the District Court in this case have restrictively interpreted the statute and have required fraudulent conduct or have read specific intent into the word "false" in Section 3729(a) before they will find a contractor liable under the False Claims Act even after the amendment. The Seventh Circuit opinion states:

> Far from an instance of *deceit and skullduggery* the handling of the situation by the University and the Medical Center evidences a spirit of compromise and accommodation that *belies any fraudulent motive.*

(*See* opinion of the Seventh Circuit in the Appendix A, page 11a). There is no fraudulent motive or skullduggery required under the modern False Claims Act to impose liability upon contractors whose bills are knowingly inflated.

Congress amended the act to make it easier for the government to prosecute large corporations under the False Claims Act. As the Senate Report on the 1986 amendments explained, "The Committee's interest is not only to adopt a more uniform standard, but a more appropriate standard for remedial actions. Sen. Report at 5272. Currently, in judicial districts

observing an "actual knowledge" standard, the government is unable to hold responsible those corporate officers who insulate themselves from knowledge of false claims submitted by lower level subordinates. Sen. Rep. at 5272.

In the case at bar it is stipulated that several corporate officers of UHS/CMS including but not limited to the Dean of the Medical School, Marshall Falk, Associate Dean for Veterans Affairs, Gary Almy, and Associate Dean for Graduate Medical Education, Mitchell Rhodes all knew of the lack of funding for the radiology residents at issue in this case. (Tr. pp. 78-79, 126, 128, 132, 133, 135, 136, 198, and 217) These agents of UHS/CMS attended deans' committee meetings and house staff affairs committee meetings wherein the lack of funding for the radiology residents was discussed. (Trial Exhs. 15-17). Additionally it was stipulated at trial by UHS/CMS that Eugene Lenarz, an educational specialist at the VA North Chicago, would testify that if there was no funding by VACO that the VA would not pay UHS/CMS for the radiology residents. (Tr. p. 83). Further, UHS/CMS stipulated that if an outside party (VAMCNC) didn't pay for these radiology residents then UHS/CMS would have to pay for them. (Tr. p. 301). These stipulations meet the actual knowledge standard under § 3729(b). Therefore, false claim liability should have been imposed in this case and both the Seventh Circuit and the District Court made rulings that were clearly erroneous.

General agency law applies under the False Claims Act to the corporate principal where the agent was acting within the scope of his authority for the purpose of benefiting the corporation. *United States v. Hill,* 676 F. Supp. 1158 (N.D. Fla. 1987). Therefore, the knowledge, actions and omissions of UHS/CMS agents, Mitchell Rhodes, Associate Dean of Graduate Medical Education, Dr. Gary Almy, Associate Dean for Veterans Affairs, John Gantz, its Vice President of Finance and Marshall Falk, Dean of UHS/CMS make UHS/CMS vicariously liable under the

False Claims Act, since they acted within the scope of their authority as employees of UHS/CMS.

The Seventh Circuit's opinion states:

> Throughout the process, the Veterans Administration expressed optimism to both the Medical Center and the University that funding might become available. *No legitimate reading of the record can support an inference that any party involved knew the possibility of funding was foreclosed.*

(Appendix A, pp. 10a to 11a). This is a clear distortion of the trial record. When UHS/CMS billed the VAMCNC for the last quarter of the academic year 1989-1990 UHS/CMS had been told that the possibility of funding was completely foreclosed and *both* parties knew there would be no funding for these positions. The academic year had ended on June 30,1990 and UHS/CMS had agreed to repay the $45,000 by way of an offset from the last quarter payments that were paid in November 1990.

Even the Seventh Circuit's own opinion is clear on this point they said:

> After exploring whether it could receive after-the-fact funding *and realizing it could not, the Medical Center demanded a refund from the University by way of a July 9,1990 letter from the Medical Center's chief of fiscal services.*

(Appendix A, p. 7a). Even though funding was completely out of the question at this juncture, the last quarter (April, May and June) bills for the academic year 1989-1990, from UHS/CMS

arrive at the VAMCNC in November 1990 with amounts due for the services of radiology residents. (Appendix K and Tr. Exh. 162). These three invoices are unique because the VA crossed out amounts owed on these invoices for each line item for radiology residents for all three months and replaced the amounts with zeros. *Id.* On November 15, 1990 David Barton from the VAMCNC office wrote John Gantz the Vice-President of Finance at the University and told him for the second time that payments were suspended on the radiology residents because the Radiology Department did not have the funds authorized for the academic year 1990. (Appendix P, page 65a, Trial Exh. 70, the letter and attachment stating reasons for suspended payments).

Even after David Barton writes John Gantz on July 9,1990 four months prior to his second letter, and advises him that there is no funding authorization and issues a bill of collection, John Gantz does not stop the billing for these radiology residents. This time however the VAMCNC catches the improper amounts billed for the radiology residents for the last quarter of the academic year 1989-1990 and informs UHS/CMS that payments will be suspended. (Appendix P, page 65a). In summary, the invoices sent by UHS/CMS for the fourth quarter of the academic year 1989-1990 to the VAMCNC for payment were submitted with knowledge they were false and the Seventh Circuit's ruling that there was no false claim is clearly erroneous.

UHS/CMS argued that it was the VAMCNC's duty under the disbursement agreement to monitor the bills. The Seventh Circuit opinion also relies heavily on this fact. (Appendix A, pp. 11a and 4a). However, this argument lacked a factual foundation. The record clearly indicates that the disbursement agreement is not applicable and therefore the VAMCNC had no contractual duty to monitor the bills under this agreement. There is uncontradicted trial testimony by VAMCNC employees and UHS/CMS employees that the disbursement agreement was not intended to

include payment for residents who were not funded through VACO, like the radiology residents in this case. Eugene Lenarz, the VA employee who assisted in the drafting of the disbursement agreement, testified that this was the case. (Tr. p. 137, 191). Mitchell Rhodes, the Associate Dean for Graduate Medical Education at the UHS/CMS, negotiated the agreement and testified to this fact. (Tr. pp. 291, 292). David Barton, the Chief of the Fiscal Services at VA North Chicago during the time period covered by the complaint, stated in his testimony the language in the disbursement agreement referring to "positions allocated" would refer only to positions approved for funding through VACO. (Tr. p. 255). There is no testimony on the record that indicates the disbursement agreement would apply to residents that were not approved for funding by VACO.

In essence, the UHS/CMS invoiced the radiology residents' daily rate, salary and fringe benefits as if the disbursement agreement governed their compensation and as if they had a contract for these positions with VACO, when in reality there was no daily rate, salary level or fringe benefits established for these residents, since no contract existed setting forth these amounts. There are daily rates and salary levels set up in the invoices for these amounts and 8.33 percent in fringe benefits ("accrued vacation") is added on to their salaries as well, on the last page of the invoice. (Trial Exhs. 54-65 and/or VA paid quarterly invoices 159-162).

The scheme in this case encompassed UHS/CMS submitting false invoices as a contrivance to falsely obtain government monies based upon subtleties in accounting procedure. In *United States v. Jackson*, 845 F.2d 880 (9th Cir. 1988) the court said:

> We see no difference between the act of filing a form fraudulently, to cause the government

> to abandon its investigation of an overpayment and the act of filing a form fraudulently to cause the government to make payment. The latter is a classic false claim while the former is such a claim disguised only by subtleties of accounting procedure.

Jackson, supra, at 882. The *Jackson* decision clearly makes this type of scheme a false claim.

Since the disbursement agreement was not applicable, the statements in the invoices as to salary and daily rates that were set pursuant to that agreement are false. The entry requesting money due is also false. This means there were three false statements per radiology resident per month, sixty-nine false statements over the twelve month period (23 separate entries for radiology residents).

II.

THE CONFLICT OF INTEREST OF DR. GARY ALMY WHO WORKED FOR BOTH THE UHS/CMS AS ASSOCIATE DEAN FOR VETERANS AFFAIRS AND FOR THE VAMCNC AS CHIEF OF STAFF SHOULD MAKE THE UHS/CMS MORE CULPABLE UNDER THE FALSE CLAIMS ACT.

The Seventh Circuit opinion states that, "the handling of the situation by the University and the Medical center evidences a spirit of compromise and accommodation. . . ." This is because of the power and influence the University had over the VAMCNC. Many of the department chairs at the University were also chiefs of their respective departments at the VAMCNC. Additionally, Gary Almy, who certified the invoices for payment to the University as part of his job as chief of staff at the VAMCNC, also received $14,000 from UHS/CMS and he knew

there was no funding for these residents and therefore no amounts due to UHS/CMS.

The Seventh Circuit seems to be making some type of estoppel argument because of the knowledge and position of the medical center in this case. (Appendix A, p. 11a) In *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 153 (9th Cir. 1991), the water agency also argued the government was estopped by the knowledge of its officers. The court did not agree with this position citing *Heckler v. Community Health Services*, 467 U.S. 51 (1984). "Hagood claims the water agency proceeded unscrupulously, indeed with knowledge of the falsity of its claim, with knowledgeable government officials abetting its behavior, Hagood's allegations constitute a cause of action." *Hagood* at 1422.

Like in *Hagood*, UHS/CMS proceeded unscrupulously, indeed with knowledge of the falsity of their invoices, with Gary Almy a knowledgeable government employee, who received a stipend from the UHS/CMS abetting their behavior. Gary Almy, as Chief of Staff at the VAMCNC, certified all the invoices for payment and signed and dated them. (Trial Exhs. 159-162). He was also the Associate Dean for Veterans Affairs for UHS/CMS. (Tr. 211 and 238). Most of the deans' committee minutes were drafted under the direct supervision of Gary Almy, signed by him and approved by the Dean at UHS/CMS Marshall Falk. (Tr. 212). He also signed the house staff committee minutes. (Tr. p. 222). He knew there was no funding because he was on these two committees. He also knew because it's stipulated that he spoke to Eugene Lenarz, the educational specialist concerning this issue in March 1990. (Tr. pp. 204-205). Without his signature the bills would not have been paid. (Sharon Wilson Evidence Deposition, p. 30). Gary Almy received $13,000-$14,000 per year from UHS/CMS to facilitate a smooth working relationship with the VAMCNC, where he was chief of staff. (Tr. pp. 211 & 238). Gary

Almy performed UHS/CMS work at the VAMCNC and did not have office space at UHS/CMS. (Tr. pp. 239 & 242). There is no evidence on the record that Dr. Almy was teaching during the time period of the complaint. Gary Almy also described his duties as Associate Dean for Veteran Affairs "to facilitate an affiliation between a teaching hospital, and its affiliated medical school." (Tr. p. 211).

Congress enacted a rule, 18 U.S.C. § 209, a criminal statute, which prohibits public employees from receiving additional compensation from private sources. (*See* Appendix Q, Text of Pertinent Statutes, p. 69a). One of the policy justifications for this statute is that the private paymaster will have an economic hold over the employee, and that the employee might tend to favor the private paymaster in government business. *Id.* at 165. In this case UHS/CMS had an economic hold over Gary Almy. Further, Almy knew UHS/CMS also exerted substantial political power at the VAMCNC. The combination of these two factors led Gary Almy to certify the invoice for radiology residents even though he knew there was no funding for these positions and therefore no amounts due.

In *Heckler v. Community Health Services*, 467 U.S. 51 (1984), the Supreme Court said,

> Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law. . . . [T]hose who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law.

Id. at 63. When Gary Almy facilitated the payments to UHS/CMS for the radiology residents there could be liability under 18

U.S.C. § 209(a) against UHS/CMS as well as false claims liability.

A. Government Knowledge Of UHS/CMS False Statements Is No Defense.

The Seventh Circuit seems to rely on the fact that because the VAMCNC had knowledge of the fact that there was no funding there could be no false claims. (Tr. p. 377). However, in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 153 (9th Cir. 1991) the court held that if relevant government officials know of the falsity of a claim it is not in itself a defense. In a case where the government was aware that the builder misrepresented costs on a project, the Ninth Circuit assessed forfeitures and civil penalties notwithstanding government's knowledge. *United States v. Erlich*, 643 F.2d 634 (9th Cir. 1981). In light of the case law, the Seventh Circuit's ruling that there was not a false claim by UHS/CMS because the VAMCNC knew there was no authorization for funding is clearly erroneous.

B. No Damages Are Necessary For UHS/CMS To Be Liable Under The Act.

The Seventh Circuit opinion seems to rely in part on the fact that since UHS/CMS repaid the amounts they received from the VAMCNC there was no damage to the government and therefore there can be no false claim. (Appendix A, page 12a). Case law holds contrary to the Seventh Circuit opinion. The United States is entitled to recover civil penalties under the act solely upon proof that false claims were made, without any proof of damages. *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965). No damages need be claimed to recover civil penalties under the False Claims Act. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 153 (9th Cir. 1991).

III.

ALL RELATOR'S CLAIMS SHOULD NOT BE BARRED AND DISMISSED BY *RES JUDICATA* SINCE "RETALIATORY DISCHARGE" UNDER STATE LAW AND AN ACTION FOR "WHISTLEBLOWER PROTECTION" UNDER 31 U.S.C. § 3730(h) ARE DIFFERENT CAUSES OF ACTION BASED UPON SEPARATE AND DISTINCT FACTS AND ACTIONS OF UHS/CMS.

In his memorandum opinion dated December 7, 1993, in footnote one, speaking to the allegations contained in the second amended complaint Judge Grady at the district court level said:

> In any event it appears that Hindo already made *some* of those allegations in state court to support claims of interference with contractual relations. And, some of those allegations pertain to his discharge from the chairmanship of the radiology department. As such, *res judicata* would bar relitigation of the claims supported by those allegations.

(Appendix H, p. 29a). However, many of the allegations contained in the second amended complaint (Appendix I, pp. 30a to 41a) were not included in the Lake County case. (Appendix L, pp. 48a to 56a) and should therefore not be barred by *res judicata*. *They involve a different core of operative facts that were not at issue in the Lake County case.*

To interpret congressional intent with respect to the statute we must examine the Legislative History of the False Claims Amendment Act of 1986. The committee believes protection

should extend not only to actual *qui tam* litigants, but those who assist or testify for the litigant, as well as those who assist the government in bringing a false claims action. Protected activity should therefore be interpreted broadly. (Sen. Rep. 5299). The committee explained that this provision sought "to halt companies and individuals from using the threat of economic retaliation to silence "whistleblowers," as well as to assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." Sen. Rep. at 5299.

In interpreting the False Claims Act so as to do justice to the legislative intent, this Court must be mindful of Congress' objective in encouraging individuals "knowing of government fraud to bring this information forward," Sen. Rep. at 5267. In light of this congressional intent, the Court should not bar all the Relator's § 3730(h) claims because such a decision might deter individuals who know of government fraud from coming forward and exposing the fraud.

Count III, the Relator's § 3730(h) claims, presents a different cause of action than the Illinois retaliatory discharge case. In order for the doctrine or *res judicata* to apply there must be an identity of causes of action. *Torres v. Rebarchak*, 814 F.2d 1219, 1222 (7th Cir. 1987). In the Illinois Lake County case the cause of action was retaliatory discharge, specifically alleging that UHS/ CMS took his chairmanship position away because he blew the whistle on his employer. (The first amended complaint from the Lake County Case is included in the Appendix A, pp. 48a to 56a). Plaintiff concedes that retaliatory demotion alleged in the Lake County case is barred by *res judicata* in this case. Under Count III, the plaintiff seeks "whistleblower protection" for harassment and discrimination, some acts occurring after the motion for summary judgment was entered in the Lake County case.

Both of these complaints contain a different core of

operative facts because there have been continuing threats, harassments and other acts of discrimination that were not pled in the Lake County case. Some of the acts include: (1) threatened removal of the Relator's tenure status at UHS/CMS if the Relator sought to enforce his rights; (2) denial and removal of the University clinical privileges at the McCormick Health Clinic, Radiology Division, which resulted in loss of income to the Relator; (3) moving the Relator's classes to remote parts of the school so that students could not possibly attend the same; (4) denial of basic office supplies to Relator's UHS/CMS department and confiscation of research equipment, including denial of access to the equipment essential to his position; (5) loss of previously approved funding for a newly developed applied imaging venture as well as earnings therefrom; (6) failure to pay for the VAMCNC portion of Relator's salary, after Relator's VAMCNC position will end as UHS/CMS does with other of its dual positioned employees; (7) denied reimbursement for out-of-pocket expenses, including but not limited to, travel funds and societal dues relating to the continuing education requirement for maintaining the Relator's medical licensing; (8) denying Relator reappointments to academic assembly committee, admission committee, sabbatical committee, continuing education committee, faculty affairs committee, and university standing committee at UHS/CMS; (9) creating an atmosphere at UHS/CMS where Relator was ostracized from colleagues whose support is essential to the Relator in his efforts at obtaining grants as well as facilitation of healthy work environment; (10) UHS/CMS failure to approve the contractual agreement between Relator and Dr. Greenfield resulting in loss of position and earnings; (11) defendants' agents, Marshall Falk, Gary Almy, along with Leonard Rogers of the VAMCNC conspired to remove Relator from his position as Chief of Radiology services at the VAMCNC by submitting false resignation documents to the central office of the VA; (12) loss of secretarial services and office space at UHS/CMS; (13) loss of status and prestige,

emotional distress, mental suffering and humiliation. (Appendix I, pp. 39a and 40a).

The construction of § 3730(h) by the Court of Appeals has been limited. In *Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994) this Seventh Circuit ruled that an employee could maintain a claim under the whistleblower protection provision of the False Claims Act, even though she had not filed a suit under the act. This court appeared to broadly construe the whistleblower statute in this case. The court stated there is nothing in the language or background of § 3730(h) that suggests that by paying enough to cause the government to forego suit, employers acquire the right to *shoot the bearers of bad tidings*. *Id.* at 864. Similarly, in this case the fact that Hindo's attorney chose to proceed in state court on a different theory of retaliatory discharge, which did not apply to these facts, should not give UHS/CMS a free reign to harass and destroy Dr. Hindo. Since the statute must be broadly construed, and the policy behind the congressional intent was to enact a "whistleblower protection" statute with some teeth in order to protect those who expose fraud, the Court has enough precedent to narrowly construe *res judicata* to these facts.

In *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir. 1993), the court held that a former employee's Title VII discrimination action claiming her discharge had been based on the fact that she was white and pregnant was not barred by *res judicata* based on an earlier action for continuation of benefits under the provision of ERISA, where the district judge granted summary judgment for the employer Cencom. The court said, "It is like the typical retaliation case in which an employee files an action based on some set of facts, and then the employer fires him for filing the claim, precipitating a second claim. They are two claims, not one, for purposes of *res judicata*." *Id.* at 227.

In the case at bar each act of discrimination and harassment

under § 3730(h) of the False Claims Act is *a new and different cause of action.* Many of the facts alleged by the plaintiff are continuing even now, almost five years after Dr. Hindo wrote to Edwin Derwinski complaining of radiology residency fraud at the VAMCNC. Under retaliatory discharge, the facts in dispute stop when the employer is discharged, under the whistleblower protection statute, as applied to this case, the core of operative facts in dispute commenced in this case after the economic retaliation. Sometimes the acts that violate § 3730(h) are subtle as the court acknowledges in *Neal, supra, "It is possible, moreover, that the equitable tolling or estoppel would apply to Section 3731(b)(1) if the firm patiently waited six years from the false claim and then sacked the troublesome employee." Neal* at 866.

In *Herrmann*, the court said, "only one fact on which the two claims are based is the same — that the plaintiff was terminated." *Id.* at 227. In the present case, the only fact which is the same in both causes of action is that plaintiff suffered through acts of retaliation because he blew the whistle on his employer UHS/CMS for radiology residency fraud. The reason for the retaliation is the same in both cases. However, the core of operative facts for the discrimination, harassment and retaliation are separate and distinct from the facts that gave rise to the plaintiff's retaliatory discharge claim.

CONCLUSION

To protect the treasury against contractors that knowingly submit inflated claims to United States governmental entities, the Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A— OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT REPORTED AS *UNITED STATES EX REL. WALID A. HINDO V. UNIVERSITY HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL (1995)* DATED SEPTEMBER 6, 1995

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 95-1079

WALID A. HINDO,

Plaintiff-Appellant,

v.

UNIVERSITY OF HEALTH SCIENCES/THE CHICAGO MEDICAL SCHOOL,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 1432—**John F. Grady,** *Judge.*

ARGUED MAY 12, 1995—DECIDED SEPTEMBER 6, 1995

Before BAUER, MANION, and KANNE, *Circuit Judges.*

BAUER, *Circuit Judge.* Walid Hindo, a current radiologist and former Chairman of the Department of Radiology for the University of Health Sciences/The Chicago Medical School ("University"), brought this action against the University under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* Hindo claimed that the University defrauded the

government when it sought from the North Chicago Veterans Administration Medical Center reimbursement for the salaries and benefits paid by the University to radiology residents who worked at the Medical Center during the 1989-90 academic year, but for whom funding had not been approved by the Veterans Administration. As required under the Act, 31 U.S.C. § 3730(b)(2), Hindo filed his complaint *in camera* under seal and served a copy of it upon the United States government, which had sixty days to "elect to intervene and proceed" with the action. *Id.* The government ultimately notified the district court pursuant to 31 U.S.C. § 3730(4)(B) that it declined to take over the action. That gave Hindo the right to "conduct the action." 31 U.S.C. §§ 3730(4)(B), (c)(3). Hindo's complaint was then unsealed and served upon the University in November 1992.

Sometime thereafter, Hindo filed an amended complaint which added a new count alleging that the University violated 31 U.S.C. § 3720(h) by threatening to terminate his tenure and by discharging him from his position as chair of the Department of Radiology for reporting the University's supposed fraudulent billing to the Medical Center. The University moved to dismiss that count on the ground that Hindo's unsuccessful prior state court litigation against the University for retaliatory discharge barred those claims. *See Hindo v. University of Health Sciences/The Chicago Medical Sch.*, 604 N.E.2d 463 (Ill. App. Ct. 1992), *appeal denied*, 612 N.E.2d 513 (1993). In late 1993, after the discovery cutoff date and while the University's motion to dismiss was pending, Hindo sought leave to file his Second Amended Complaint which added additional allegations of harassment by the University in "retaliation" for Hindo's reporting the fraudulent billing. The district judge denied Hindo's motion to file his Second Amended Complaint and subsequently granted the University's motion to dismiss Hindo's § 3720(h) claim "due to the preclusive effect of the judgment on Hindo's state retaliatory discharge claim."

Appendix A

The bench trial on Hindo's original claim began in late 1994. The district judge asked the parties to focus on the issue of whether the University's invoices were false, and of what the University and the Medical Center knew about the status of Veterans Administration funding for the radiology residents when the Medical Center paid the University's bills for reimbursement of the radiology residents' salaries and benefits. After Hindo had presented his evidence, the University moved for a directed verdict under Federal Rule of Civil Procedure 52(c) on the ground that Hindo's evidence confirmed that the University had not made any false claims. The district court granted the University's motion and entered judgment for the University. Hindo timely appealed. As with most False Claims Act cases, this case is heavily dependent on its facts, which we will now undertake to recite in unfortunate detail.

Hindo is a tenured member of the University's faculty. Until early 1990, he was also the Chairman of the University's Department of Radiology and on the staff at the Medical Center.

The University operates a medical school in North Chicago, Illinois, adjacent to the Medical Center, with which it is affiliated. The University operates privately, while the Medical Center is funded by the Veterans Administration. The University maintains advisory responsibility for the education and training programs conducted with the Medical Center, which retains full responsibility for the care of patients, including all administrative and professional functions relating to that care. The University also oversees a Deans Committee composed of senior University faculty members which serves as a liaison between the University and the Medical Center. Additionally, the University is responsible for nominating all physicians for residency programs, in terms of number and qualifications agreed upon by the Deans Committee and the Veterans Administration.

Appendix A

The two parties operated under a Disbursement Agreement during the relevant time period. Under this agreement, the University paid salaries and benefits directly to the residents, and the Medical Center reimbursed the University the residents' costs in two steps. First, the University submitted to the Medical Center a summary schedule of duty assignments for residents before the start of each calendar quarter. Once the schedule was approved by its Chief of Staff, the Medical Center would pay in advance eighty per cent of the estimated charges for the quarter.

The final payments were made after the end of the calendar quarter. To obtain final payment, the University sent the Medical Center an invoice naming each of the residents that performed services during that quarter, the program level (number of years of training) of each resident, the number of days each resident spent at the hospital (duty days), the appropriate daily charge for each resident, and the total charge for each resident. The number of duty days for each resident was determined by reviewing the Medical Center's time records for each resident.

Before making the final quarterly payment, the Medical Center had an elaborate four-step procedure to review the University's invoices and verify their accuracy. We need not describe this system in detail, but will summarize it. The first three steps called on different levels of Medical Center personnel to certify that the services had been performed as invoiced, sign forms to that effect, and authorize payment of the invoices. The final step required a Medical Center accountant to verify from a certain Veterans Administration form that the Veterans Administration had funded each and every residency position. After the successful completion of all four steps, the Medical Center's Department of Fiscal Services would execute payment of the invoice to the University.

Appendix A

With that background, we now move to the circumstances of Hindo's claim. The Medical Center had applied for and been granted funding for two radiology residencies for the 1988-89 academic year. This funding, however, was temporary, and the Medical Center was required to reapply for the 1989-90 year, which it did in mid-1988. On October 12, 1988, the Veterans Administration notified the Medical Center that it had denied permanent funding for the two radiology residencies. The Veterans Administration permitted the Medical Center one week to appeal its decision. The Medical Center missed the deadline for appeal by two days; the Veterans Administration considered this delay fatal to the Medical Center's appeal. The Veterans Administration, however, placed the Medical Center's request on a "waiting list for temporary resident positions" and promised such funding if resources became available. As we shall see, this last missive caused the Medical Center personnel a certain degree of optimism for the 1989-90 academic year which they were loathe to relinquish short of a definite and final denial of their plea for funding.

As is typical, the University relied on the National Resident Matching Program to staff its resident program from medical schools across the country. The match program imposed a deadline of January 1989 for offering residency positions at the University. Early that month, Dr. Mitchell Rhodes, the University's Associate Dean for Graduate Medical Education Clinical Facilities, contacted Dr. Victor Wahby of the Veterans Administration of Central Office regarding the status of funding for the radiology residencies. Dr. Wahby told Dr. Rhodes that although there was no guarantee, it was likely that funding would be approved. Based on this information, the University included the two radiology residencies in its submissions to the National Matching Program.

Appendix A

In addition to this, there were other expressions of optimism for funding. The minutes of meetings of the Medical Center House Staff Review Committee and Medical Center Deans Committee noted that funding had not yet been approved, but that due to the importance of the radiology residencies, some alternative methods for supporting the positions must be explored. In addition, on May 12, 1989, the Veterans Administration Central Office sent a letter to the Medical Center stating that "it is possible that we may glean a small number of medical resident positions which we may be able to allocate on a temporary basis for the upcoming year." In response to the letter, Eugene Lenarz who had been assigned the task of ensuring funding for these positions by the House Staff Committee, sent a letter urging the allocation of funding and emphasizing the priority of the Medical Center's request.

Through the month of June and even into July of 1989 (past the July 1 start date of the academic year), members of the Medical Center hierarchy continued to pursue funding for the radiology residencies. Past experience indicated that funding had come through at a late date before and that the Medical Center was high on the priority list for additional funds. Based on those efforts and because two slots had already been committed to the match program, two radiology residents started at the Medical Center on July 2, 1989. These residents worked full-time at the Medical Center throughout that academic year. Funding for the residencies, either from the Veterans Administration or other avenues, never materialized. Notwithstanding this lack of funding, the Medical Center never objected to the presence of the radiology residents.

The University submitted its first estimated bills to the Medical Center in January 1990 for the last two quarters of calendar year 1989. Due to a delay in obtaining time cards from

the Medical Center, the University did not submit its final invoices for the first three quarters of the academic year until April 1990. The University's invoices included the costs of the radiology residents. They also included the information required by the Disbursement Agreement, but made no representation as to whether funding had been obtained from the Veterans Administration for radiology or any other residencies. As one might expect, since the Veterans Administration had not approved funding for the radiology residencies, no Veterans Administration form authorizing such funding existed. Notwithstanding the lack of this form and in contravention of their policy and practice for approving invoices from the University, the Medical Center approved the University invoices for reimbursement of the radiology residents' expenses and paid the invoices. The Medical Center paid in excess of $45,000 to the University for these residents.

In July 1990, the Medical Center discovered that it had not received funding for radiology residencies and had improperly paid the University for those services. After exploring whether it could receive after-the-fact funding and realizing it could not, the Medical Center demanded a refund from the University by way of a July 9, 1990, letter from the Medical Center's Chief of Fiscal Services. The Medical Center suggested either a direct refund or an offset of future payments; the University opted for the latter arrangement. Accordingly, the Medical Center subtracted approximately $45,000 from its November 1990 payment. That ended the matter between the Medical Center and the University. And, as we stated earlier, the United States government elected not to pursue the matter further.

As an initial matter, the University restates on appeal its argument that the district court lacked jurisdiction to hear this matter. It cites 31 U.S.C. § 3730(e)(4)(A), which states:

Appendix A

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing audit, or investigation, or from the news media unless the person bringing the action is an original source of the information.

The University claims that the letter from the Medical Center to the University constitutes a public disclosure under this section and that Hindo is not an original source of the alleged false claim. This argument is unavailing.

An aim of the Act is to encourage "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward," H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986); in accordance with this goal, this section permits only that insider/"whistleblower" to maintain the *qui tam* action. It is to be read conjunctively and the jurisdictional bar is to be raised only when each and every component of this section is present. *See United States ex rel. Lindenthal v. General Dynamics Corp.*, Nos. 93-16690, 94-16005, 93-16823, 1995 WL 453279, at *6 & n.8 (9th Cir. Aug. 2, 1995). The University's argument fails because if nothing else, this suit is not based on a public disclosure of the alleged fraud.

The only communication of this alleged false claim was by letter between the two parties themselves. Such a communication between two private parties is not a public disclosure under this section. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652-53 (D.C. Cir. 1994); *Wang v. FMC*

Corp., 975 F.2d 1412, 1416 (9th Cir. 1992). The district court therefore properly exercised its jurisdiction over this case.

Turning to the substantive issue in this case, the False Claims Act imposes liability on one who "knowingly presents" to the United States government "a false or fraudulent claim for payment." 31 U.S.C. § 3729(a). For purposes of this section, "knowingly" means the person (or entity):

> (1) had actual knowledge of the falsity of the information at issue;
>
> (2) acted in deliberate ignorance of the truth or falsity of that information; or
>
> (3) acted in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b). Innocent mistakes or negligence are not actionable under this section. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991). "[W]hat constitutes the offense is not intent to deceive but knowing presentation of a claim that is either fraudulent or simply false. The requisite intent is the knowing presentation of what is known to be false." *Id.* at 1420. In short, the claim must be a lie. *Wang*, 975 F.2d at 1420.

Hindo contends that the invoice itself for the radiology residents constitutes a false claim because the University knew that the Medical Center had not obtained funding for the residencies. He argues that the falsity was an implied representation by the University in each invoice that the Medical Center had indeed obtained funding. His argument fails because it distorts the record produced at trial and misapprehends the law.

Appendix A

First, there is nothing false in the University's invoices. Those radiology residents performed the work listed in the invoices, and there has been no contention otherwise. An example of a false statement in an invoice in a similar context is the representation that a resident worked five days a week at a hospital for a given quarter when he worked only three; clearly, such is not the case here. With no false statement, we must look then for some purposeful scheme by the University to defraud the Medical Center and ultimately the government. But even reading the scienter requirement in its broadest expanse, Hindo cannot make out a claim. He obstinately maintains that at all times, the University had actual knowledge that the Veterans Administration did not fund the radiology residencies. Indeed, to hear Hindo tell the story, the University knew from the outset that the Veterans Administration never would fund those positions and thereby conducted a sinister fraud upon the government from the moment it submitted the two positions to the match program until it billed the Medical Center for the residents' costs. The record, however, tells a different story, and it is the story to which we are bound.

Both the Medical Center and the University had a vested interest in securing funding for two radiology residencies. The Medical Center wanted them to improve the level of care it offered to its patients; the University wanted them to build prestige in its residency program. Obviously, the Medical Center's desire was more tangible and direct, and it fought very hard to obtain funding for the residencies. It not only sought funding from the Veterans Administration, but also explored alternative sources. Throughout the process, the Veterans Administration expressed optimism to both the Medical Center and the University that funding might become available. No legitimate reading of the record can support an inference that any

party involved here knew that the possibility of funding was foreclosed.

Far from an instance of deceit and skullduggery, the handling of this situation by the University and the Medical Center evidences a spirit of compromise and accommodation that belies any fraudulent motive. From the University's perspective, it based its decision to hire two radiology residents on Dr. Wahby's statement to Dr. Rhodes that there was legitimate reason to believe funding would become available. Once it made the commitment to the match program, the University knew that there was a real chance that it would be required to pay the radiology residents out of its own pocket, even though they would be performing for the entire academic year at the Medical Center. The Veterans Administration, through the Medical Center led it to believe that funding might come through even after the residents began working full-time at the Medical Center. It was not unreasonable and certainly not fraudulent for the University to include reimbursement for these residents' costs in its invoice to the Medical Center. It could safely assume that if funding had become available, it would be repaid; if the funding had not been approved, it would not be repaid for the residents.

For its part, the Medical Center worked actively to secure funding for a program it considered important and through its efforts, contributed to the University's belief that funding might become available; it believed that funding would become available and knew that was possible even after the onset of the academic year. In addition, when the University invoiced the radiology residents' costs, the Medical Center was in the best position to ascertain whether funding had been obtained. The Medical Center, moreover, had procedures in place to verify that very fact. Considering that the Medical Center had ready access to the necessary information and that the University assumed all

the risk of securing the residents upon the Veterans Administration's assurances, it is difficult to paint the University as a defrauder.

We would be remiss if we failed to notice that the government has not been harmed here. Indeed, the Medical Center received the benefit of two full-time radiology residents at no cost. Admittedly, it was without $45,000 for a short term, but once the bookkeeping error was noticed, it was quickly corrected. Judging by the apparently satisfactory conclusion in the eyes of the Medical Center and the government's refusal to take up this action, it appears that no party to the incident believes any harm was done.

In conclusion, there is no false claim or fraud here. At most, the University was perhaps negligent in not ascertaining whether funding had been approved for the radiology residencies before it invoiced the Medical Center for its costs. But negligence is not actionable. Hindo's claim, therefore, fails.

With respect to Hindo's second claim, he purports to appeal the district court's dismissal of count III of his amended complaint on the grounds that it is barred by *res judicata*. In reality, however, Hindo admits that the district court's ruling was appropriate. His brief states: "Plaintiff concedes that the retaliatory demotion alleged in the Lake County case is barred by res judicata in this case." Hindo was forced to make this concession because the actions in both cases are identical. The Illinois Appellate Court characterized Hindo's complaint in the state case in the following manner: "In count I, plaintiff [Hindo] alleged defendants [the University] discharged plaintiff from his position as chairman of the department of radiology at the University in retaliation for reporting a suspected fraud against the . . . Medical Center by University employees." 604 N.E.2d at

465. That is the identical claim made in count III of his amended complaint in this case. The three requirements of applying the preclusive effect of *res judicata* are therefore met here: the identity of parties and the cause of action and a final judgment on the merits. *See, e.g., Prochotsky v. Baker & McKenzie*, 966 F.2d 333, 334 (7th Cir. 1992).

Instead, Hindo, despite admitting count III of his amended complaint is barred, maintains that count III of his second amended complaint (for which leave to file was denied) states a viable claim not precluded by *res judicata*. His real challenge then is to the district court's decision to deny him leave to file the second amended complaint. We review such a claim for an abuse of the district court's discretion. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir. 1995) (citations omitted). "Moreover, 'the denial will be overturned only if there was no justifying reason for it.'" *Id.* (quoting *Johnson v. Methodist Medical Center of Illinois*, 10 F.3d 1300, 1303 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2102 (1994)).

The circumstances of Hindo's motion to amend his complaint support the district court's decision to deny it. On September 22, 1993, the University filed a motion to dismiss count III of Hindo's amended complaint on the grounds that it was barred by *res judicata*. The discovery deadline was October 31, 1993. On November 3, 1993, while the district court was considering the University's motion to dismiss, Hindo filed a motion seeking leave to file a second amended complaint so that he could modify his count III.

Seeking to amend one's complaint when it appears that the current one is a sure loser is not unusual; nor is the denial of leave to file that amended complaint. Our recent opinion in *Sanders*, 56

F.3d at 774 (citations omitted), recites the litany of instances in which we affirmed a district court's denial of leave to amend a complaint where discovery had ended and a motion is pending for dismissal of the count or for summary judgment. A denial is particularly warranted in instances in which the plaintiff has failed to provide an explanation as to why the amendment did not take place sooner, and where the delay in granting the motion to amend would cause delay and burden the parties. *Id.* at 775. This is Hindo's case. Hindo (and other plaintiffs) are advised to take note of our admonition in *Sanders*, 56 F.3d at 775 (quoting William Shakespeare, Twelfth Night II 42.), "In delays there lies no plenty." Given the timing of Hindo's motion to amend his complaint, we hold that the district court did not err in denying it.

For the foregoing reason, the judgment below is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — DISTRICT COURT RULING: JUDGE GRADY'S FINDING OF FACT AND CONCLUSIONS OF LAW RENDERED AT THE END OF PLAINTIFF'S CASE DATED NOVEMBER 29, 1994

* * *

[374] THE COURT: All right. Thank you.

I'll give you my ruling on defendant's motion for judgment at the conclusion of the plaintiff's case. The question here is whether the defendant made a false claim. A claim can be false by virtue of a variety of circumstances, one of which might be a false representation made by the claimant in support of the claim.

Now in this case the claims made by the defendant University were simply the invoices submitted to the V.A. [375] Hospital. These invoices contained very little in the way of declaratory material and consisted primarily of a listing of the time spent by various radiological residents at the hospital and the charges for that time. Nowhere in the invoices is there any recitation that the Veteran's Administration in Washington had appropriated funds for the payment of these charges for radiological services. However, just as a claim may be false by reason of a false representation made in connection with it, even though not a physical part of the claim, so to a false representation can be made by implication as well as expressly.

Therefore, the question in this case as I see it is this: Did the defendant either expressly or impliedly represent to the V.A. Hospital that funding had occurred for the payment of these charges for radiological services? The answer to the question of whether there was any express representation of that kind is easy. The answer is no. No one at the University made any kind of express representation that there was funding for the radiologists.

Appendix B

That leaves the second question. Was there an implied representation that there was funding for the payment of the invoices? The plaintiff's theory in this case appears to be that the mere submission of the invoices was an implied representation that funds were available for their payment or that official funding from the V.A. in Washington had [376] occurred, as a result of which funds were available for their payment.

There is a serious flaw in that argument. The flaw is that everyone knew there had been no funding. The V.A. Hospital knew there had been no funding. Mr. Lenarz, the one most concerned with the effort to obtain funding, had up to the minute information as to whether funding had occurred, and he knew at all times that there had been no funding for these positions. The evidence fails to show that any of the principal actors at the hospital was ignorant of the fact that there had been no funding. Of course, the University also knew that there had been no funding.

In these circumstances, there is no evidentiary basis for the argument that the submission of the invoices was an implied representation that there had been funding for the positions. The University had no reason to make a representation implied or otherwise that funding had occurred when it knew that the hospital knew that that was not so.

One must distinguish between legal arguments and legal theories and facts, and I think this case presents a good illustration of the distinction between the two. The argument that submission of the invoices was an implied representation that funding had occurred is a legal theory designed to keep the plaintiff in court, but it has no evidentiary basis to support it.

Appendix B

[377] In conclusion, the Court finds that the invoices submitted by the defendant were claims but that they were not false claims because they contained no false representations of any kind nor was there any false representation either express or implied made by the defendant in connection with the claims.

Mr. Knorr's written argument in opposition to defendant's motion makes reference to the fact that many of the actors in this case were wearing two hats, that they were employees both of the University and of the hospital. That is so, but the Court fails to see that it is a fact which has any legal significance in terms of the issues in this case. The V.A. Hospital knew of the dual roles of all of these people and obviously acquiesced in that situation. Indeed the hospital derived a benefit from the relationships just as the University did. Any possible argument that can be made on the basis of the fact that some of the persons involved were employed by both the University and the hospital was obviously waived by the hospital in whose shoes Mr. Hindo stands.

The motion of the defendant for a judgment in its favor is allowed, and judgment will be entered against the plaintiff and in favor of the defendant.

I'll give you back all of your exhibits. I'll file this copy of the Sommer deposition. I would suggest that you file a copy of the Wilson deposition because, as I say, I have [378] marked up my copy and it probably is not a good idea to have that be the filed copy.

MR. NORR: And my memorandum in —

THE COURT: I'll file that. I'll see that that's filed as of today.

Appendix B

MR. OESTERLE: Judge, do you need a written order prepared by the parties?

THE COURT: No, I'll enter a Rule 58 judgment.

MR. OESTERLE: Thank you, your Honor.

(Which concluded the proceedings in the above-entitled matter.)

CERTIFICATE

I hereby certify that the foregoing is a transcript of proceedings before the Honorable John Grady on November 29, 1994.

DATED: November 29, 1994

APPENDIX C — JUDGMENT IN A CIVIL CASE FORM AO 450 ENTERED NOVEMBER 29, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NUMBER: 91 C 1432

USA EX REL: WALID HINDO

V.

UNIVERSITY OF HEALTH SCIENCES/THE CHICAGO MEDICAL SCHOOL

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED

That judgment is entered in favor of the defendant, University of Health Sciences/The Chicago Medical School and against the plaintiff, Walid A. Hindo.

November 29, 1994
Date

H. Stuart Cunningham
Clerk

s/ illegible
(By) Deputy Clerk

APPENDIX D — MINUTE ORDER OF NOVEMBER 29, 1994 GRANTING DEFENDANT'S MOTION FOR JUDGMENT AT THE CLOSE OF PLAINTIFF'S CASE, DOCKETED BY THE CLERK ON DECEMBER 1, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Robert B. Ramirez Jr.
Attorney at Law
1141 Waukegan Road
Glenview, IL 60025

Case Number: 1:91-cv-01432

Title: Hindo v. Univ of Health

Assigned Judge: Honorable John F. Grady

MINUTE ORDER of 11/29/94 by Hon. John F. Grady: Defendant's motion for judgment at the close of plaintiff's case is allowed. The court will enter judgment for the defendant. Mailed notice

This order was entered on the docket by the Clerk December 1, 1994

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX E — MINUTE ORDER OF NOVEMBER 29, 1994 ENTERING JUDGMENT FOR DEFENDANT DOCKETED BY THE CLERK ON NOVEMBER 30, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Robert B. Ramirez Jr.
Attorney at Law
1141 Waukegan Road
Glenview, IL 60025

Case Number: 1:91-cv-01432

Title: Hindo v. Univ of Health

Assigned Judge: Honorable F. Grady

MINUTE ORDER OF 11/29/94 by Hon. John F. Grady: Trial ends (bench) Judgment is entered in favor of the defendant, University of Health Sciences/The Chicago Medical School and against the plaintiff, Walid A. Hindo, terminating case Mailed notice

This order was entered on the docket by the Clerk November 30, 1994

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX F — MINUTE ORDER OF NOVEMBER 3, 1993 DENYING PLAINTIFF LEAVE TO FILE ITS SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge *Judge Grady*

Case Number *91 C 1432*

Date *November 3, 1993*

Case Title *United States of America ex. rel. Walid Hindo v. University Health Sciences/The Chicago Medical School*

MOTION:

Plaintiff's motion for leave to file Plaintiff's 2nd amended complaint

DOCKET ENTRY:

* * *

(10) ☒ (Other docket entry)

Plaintiff's motion for leave to file plaintiff's 2nd amended complaint is denied.

On oral motion, plaintiff is given leave to file response to additional defenses by November 17, 1993.

* * *

Appendix F

☒ No notices required, advised in open court.

* * *

NOV 05 1993 date docketed

Stamped:

93 NOV-4 PM 5:03
CLERK
U.S. DISTRICT COURT

Date/time received in central clerk's office

APPENDIX G — MINUTE ORDER OF DECEMBER 7, 1993 ENTERING MEMORANDUM OPINION: DEFENDANT'S MOTION TO DISMISS IS GRANTED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge: *JOHN F. GRADY*

Case Number *91 C 01432*

Date December 7, 1993

Case Title *Hindo v. University*

* * *

DOCKET ENTRY:

* * *

(10) ☒ (Other Docket entry)

ENTER MEMORANDUM OPINION: Defendant's motion to dismiss count III of the amended complaint is granted.

(11) ☒ (For further detail see ☐ order attached to the original minute order form.)

* * *

☒ Docketing to mail notices

* * *

MK courtroom deputy's initials

Appendix G

5 number of notices

12/8/93 date mailed notice

TM mailing dpty. initials

[Stamped]

FILED - ED2
1993 DEC - 7 P 5:12
CLERK
U.S. DISTRICT COURT

Date/time received in Central Clerk's Office

APPENDIX H — MEMORANDUM OPINION DATED DECEMBER 7, 1993 GRANTING DEFENDANT'S MOTION TO DISMISS THE RELATOR'S 3730(h) CLAIMS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1432

UNITED STATES OF AMERICA ex rel. WALID A. HINDO,

Plaintiff,

v.

UNIVERSITY OF HEALTH SCIENCES/THE CHICAGO MEDICAL SCHOOL,

Defendant.

MEMORANDUM OPINION

Before the court is the motion of defendant University of Health Sciences/the Chicago Medical School ("the University") to dismiss Count III of the amended complaint, which is brought pursuant to the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* Counts I and II of the amended complaint allege that the University fraudulently billed the Veterans Administration Medical Center ("VAMC") in North Chicago, Illinois, for services it did not perform. Count III alleges that the University discharged relator Walid A. Hindo from his position as chairman of the Department of Radiology in retaliation for reporting the alleged fraudulent billing. According to Count III, Hindo remains a tenured faculty member at the University. Discharge from the chairmanship in retaliation for reporting a false claim would violate the "whistleblower" provision of the False Claims Act:

Appendix H

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730 (h).

The University has moved to dismiss Count III on the basis of *res judicata*. In December 1990 — three months before filing suit — Hindo brought an action in state court against the University and two of its former employees. Count I of the second amended complaint in the state action alleged that defendants discharged Hindo from his position as chairman of the Department of Radiology in retaliation for reporting the University's alleged fraudulent billing. The state court dismissed the retaliatory discharge count because Hindo had not presented facts supporting discharge; in other words, he had not been discharged but merely demoted from the chairmanship while remaining a tenured faculty member. *See Hindo v. University of Health Sciences/Chicago Medical School*, 237 Ill. App.3d 453, 604 N.E.2d 463, 468 (2d Dist. 1992). The state court concluded that Illinois does not recognize a cause of action for retaliatory demotion. *Id.*

The three requirements for applying the preclusive effect of *res judicata* are: (1) an identity of the parties or their privies; (2) an identity of the cause of action; and (3) a final judgment on the merits. *Prochotsky v. Baker & McKenzie*, 966 F.2d 333, 334 (7th Cir. 1992) (citation omitted). There is no dispute regarding the

first and third requirements. The contested issue is whether the retaliation claims under state law and the False Claims Act represent the same cause of action.

Res judicata applies because both claims arise from "a single core of operative facts." *Smith v. City of Chicago*, 820 F.2d 916, 918 (7th Cir. 1987). "If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted." *Lee v. City of Peoria*, 685 F.2d 196, 200 (7th Cir. 1982). The question why Hindo lost the chairmanship "would as a practical matter be at the center of litigation of both claims." *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 227 (7th Cir. 1993). Each claim alleges discharge from the chairmanship in retaliation for reporting the University's purported fraud as to VAMC.

Contrary to Hindo's contention, it is irrelevant for purposes of *res judicata* that the False Claims Act allows recovery on a retaliatory demotion allegation while Illinois law does not. It is well-established that, "[e]ven though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action." *Lee*, 685 F.2d at 200. Put another way, "[o]nce a transaction has caused injury, all claims arising from that transaction must be brought in one suit or be lost." *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). Hindo could have brought a 31 U.S.C. § 3730(h) claim in the state action because state and federal courts have concurrent jurisdiction over claims brought under the False Claims Act. *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624, 631-633 (N.D. Ill. 1992).

Hindo also contends *res judicata* does not apply because Count III of the amended complaint in this action is based on

some facts not considered by the state court. Specifically, in July 1990 the University threatened to revoke Hindo's tenure if he continued to challenge the loss of his chairman position.[1] This allegation is part of the core transaction giving rise to both retaliation claims. Hindo's failure to make that allegation in state court does not rescue him from the application of *res judicata* in this suit.

Accordingly, due to the preclusive effect of the judgment on Hindo's state retaliatory discharge claim, the defendant's motion to dismiss Count III of the amended complaint is granted.

DATE: December 7, 1992

ENTER: s/ John F. Grady
John F. Grady, United States District Judge

---

1. In his memorandum in opposition to the motion to dismiss, Hindo also alleges the University harassed him for reporting the fraudulent billing by: (1) denying him clinical privileges at the McCormick Health Clinic; (2) moving his classes to remote and inconvenient campus locations; (3) denying him access to research equipment and office supplies; (4) taking away some research funding; (5) failing to pay for the VAMC portion of his salary; (6) denying him reimbursement for expenses related to his employment; (7) denying him re-appointment to several University committees; (8) conspiring with other University doctors to remove him from his VAMC position; (9) denying him secretarial services; and (10) generally creating a hostile working environment and denying him economic opportunities. The court does not consider those allegations because they are not included in the amended complaint, and the court previously denied Hindo's motion to incorporate them in a second amended complaint. *See* Docket Entry of Nov. 3, 1993. In any event, it appears that Hindo already made some of those allegations in state court to support claims of interference with contractual relations. And, some of those allegations pertain to his discharge from the chairmanship of the radiology department. As such, *res judicata* would bar relitigation of the claims supported by those allegations.

APPENDIX I — PLAINTIFF'S SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

91 C 1432
Judge Grady

United States of America ex rel. Walid Hindo

Plaintiff

v.

University of Health/Sciences/The Chicago Medical School

Defendant

SECOND AMENDED COMPLAINT

Now comes the Plaintiff United States of America ex relator Walid A. Hindo, by its attorney, Robert B. Ramirez P.C., and complaining of the Defendant, University of Health Sciences/ The Chicago Medical School states as follows:

Count I

1. This action arises pursuant to the False Claims Act, 31 U.S.C. 3729, et seq. and this court has jurisdiction of this action pursuant to 31 U.S.C. 3732.

2. Walid A. Hindo is a private person who may bring this action pursuant to 31 U.S.C. 3730.

3. University of Health/Science/The Chicago Medical School (hereafter "University" or "UHS/CMS") is an Illinois not-

for-profit corporation with its principal place of business in North Chicago, Lake County, Illinois, where it owns and operates a medical school.

4. The Veterans Administration of the United States Government operates a medical center in North Chicago, Illinois for the case and treatment of veterans of the Armed Forces of the United States.

5. On information and belief, for more than ten years, the University has had a business relationship with the United States Government Veterans Administration Medical Center, North Chicago, Illinois (hereafter "VAMC"), whereby the University, after authorization and funding approval by the VAMC, scheduled its student medical residents to work at the VAMC at certain scheduled times, and the VAMC paid the University for the residents' work.

6. On information and belief, during the period July, 1989 through June, 1990, the VAMC did not authorize, nor approve funds for, the University's residents to work at the VAMC in the Department of Radiology.

7. On information and belief, the University, knowing that the VAMC had not authorized nor approved funds for its residents, submitted monthly bills to the VAMC for work allegedly performed by said residents at the VAMC during the period July 1989 through March 1990.

8. On information and belief, the VAMC paid the bills submitted by the University, the total amount of which was $45,801.88, and which were submitted as follows:

Appendix I

August, 1989	$ 5,182.66
August, 1989	$ 6,052.54
September, 1989	$ 5,857.29
October, 1989	$ 5,717.39
November, 1989	$ 725.72
December, 1989	$ 5,717.39
January, 1990	$ 5,811.06
February, 1990	$ 5,382.46
March, 1990	$ 5,355.37

9. On information and belief, the University, by submitting the aforesaid bills to the VAMC, knowingly presented false or fraudulent claims to the United States Government, thereby committing multiple violations of the False Claims Act, 31 U.S.C. 3729, and the United States Government suffered damages by paying those false or fraudulent claims.

10. That, on information and belief, to this date none of the aforementioned monies have been repaid to the VAMC.

Wherefore, the United States of America ex relator Walid A. Hindo, demands judgment against University of Health Sciences/ The Chicago Medical School, and seeks the following relief:

a. For the assessment of a civil penalty against the University of not less than $5,000 and not more than $10,000 for each violation of 31 U.S.C. 3729 pursuant to 31 U.S.C. 3729(a); and

b. For the assessment of a civil penalty against the University of three (3) times the amount of damages sustained, a total of $137,405.64, pursuant to 31 U.S.C. 3729 (a).

c. For the award, to Walid A. Hindo, of his reasonable expenses necessarily incurred, reasonable attorney's fees and costs, pursuant to 31 U.S.C. 3730(d).

Count II

11. Plaintiff reallege and incorporates paragraphs 1 through 5 of Count I of its complaint as paragraph 11 of Count II.

12. On information and belief, during the period January 1989 through March 8, 1990, and before and after that period, certain faculty and administrative employees of the University were also employed by the VAMC as physicians and administrators, including, but not limited to, Gerald Leef, M.D., who was the Acting Chief, Radiology Service at the VAMC, and Assistant Professor or Radiology and Director of Education, North Campus at the University during the aforesaid period, and Dr. Gary L. Almy, who was the VAMC Chief of Staff and was the Dean of the Medical School for Veterans Affairs as well as an Associate Professor of Psychiatry at UHS/CMS at the aforementioned periods.

13. On information and belief, during the period January, 1989, through March, 1990, the University residents, who were scheduled to work at the VAMC in Radiology Services, did not work at the VAMC at the times they were scheduled.

14. On information and belief, the University knew that said residents did not work at the VAMC as scheduled, but, through its employees, including, but not limited to, Dr. Alan Hecht, and/or Dr. Gerald Leef, M.D., caused time cards for said residents to be prepared and submitted to the VAMC, said time cards falsely stating that said residents were present, or otherwise at the VAMC

on certain dates at certain times, when said residents had not been present on those dates at those times.

15. On information and belief, the University knowingly used said false time cards as the basis for bills which the University submitted to the VAMC for payment for resident's services, which services had not been performed, and the University received payment from the VAMC for those bills.

16. On information and belief, for the period January, 1989 through June, 1989, the university submitted monthly bills to the VAMC for a total overcharge amount of approximately $15,000.00 to $16,000.00.

17. On information and belief, during the period July, 1989 through March, 1990, the University submitted monthly bills to the VAMC, which bills total $45,801.88, and which were submitted as follows:

August, 1989	$ 5,182.66
August, 1989	$ 6,052.54
September, 1989	$ 5,857.29
October, 1989	$ 5,717.39
November, 1989	$ 725.72
December, 1989	$ 5,717.39
January, 1990	$ 5,811.06
February, 1990	$ 5,382.46
March, 1990	$ 5,355.37

18. On information and belief, the University, by submitting the aforesaid bills to the VAMC, knowingly presented false or fraudulent claims to the United States Government, thereby committing multiple violations of the False Claims Act, 31

U.S.C. 3729, and the United States Government suffered damages by paying those false or fraudulent claims.

19. That, on information and belief, of this date the same monies have not been repaid to VAMC.

Wherefore, the United States of America ex relator Walid A. Hindo, demands judgment against University of Health Sciences/ The Chicago Medical School, and seeks the following relief:

a. For the assessment of a civil penalty against the University of Health Science Chicago Medical School of not less that $5,000.00 and not more than $10,000 for each violation of 31 U.S.C. 3729, pursuant to 31 U.S.C. 3729(a); and

b. For the assessment of a civil penalty against the University of three (3) times the amount of damages sustained.

c. For the award, to Walid A. Hindo, of his reasonable expenses necessarily incurred, reasonable attorneys' fees and costs, pursuant to 31 U.S.C. 3720(d).

COUNT III

NOW COMES, the Plaintiff United States of America, ex relator Walid Hindo, by its attorney, Robert B. Ramirez Jr., and complaining of the Defendant, University of Health Sciences/ The Chicago Medical School, for violations of the "Whistleblower" provision of the FCA, 3730(h) states as follows:

20. Plaintiff reallege and incorporates paragraphs 1-19 of Count I and Count II of its complaint as paragraph 20 of Count III.

Appendix I

21. The relator, Walid Hindo, M.D. was employed by the Defendant, University, as chairman of the Department of Radiology from October 1981 until August 1, 1990.

22. The relator was also employed by the Veterans Affairs Medical Center, North Chicago, Illinois (herein referred to as "VAMC") as Chief, Radiology Service from 1983 until his termination on October 1, 1990.

23. During the period July 1, 1989 to December 31, 1989, the relator, Walid A. Hindo, M.D., was on a sabbatical from both of his aforesaid positions, and, upon his return from his sabbatical resumed both positions.

24. Myron Winick, M.D. was the president of Defendant University, during the time period when the acts alleged in this complaint took place.

25. Marshall A. Falk, M.D. was the Dean and executive Vice President of Defendant, University, during the time period when the acts alleged in this complaint took place.

26. On February 7, 1990, the relator, Dr. Hindo, met with Dr. Winick, and discussed Dr. Hindo's future plans. Said meeting took place at Dr. Winick's office, during which the parties discussed the possibilities of future special research projects for Dr. Hindo, which if such projects were to occur, would be consideration for Dr. Hindo's future resignation as Chairman of the Department of Radiology, Dr. Winick and Dr. Hindo agreed to pursue negotiations toward the goal of final agreement by August 1, 1990.

27. During the aforesaid meeting, Dr. Winick prepared a letter addressed to Dr. Winick from Dr. Hindo, which his

secretary typed on University letterhead, which set forth the agreement to pursue the negotiations which Drs. Winick and Hindo had discussed. At Dr. Winick's insistence, Dr. Hindo signed the letter. Said letter was not Dr. Hindo's resignation, nor was it intended by Dr. Hindo or Dr. Winick to be Dr. Hindo's resignation at the time it was signed, or at any time in the future. A true and correct copy of said letter is attached hereto as exhibit "A".

28. On or about April 2, 1990, Dr. Hindo discovered rampant absenteeism among residents in radiology at the VAMC, and notified the VAMC's Associate Chief of Staff for education, Conrad Swartz, as well as other Defendant employees, of said absenteeism. Conrad Swartz, M.D. was also a professor at the University and a member of its Dean's committee.

29. On or about April 7, 1990, Dr. Hindo became informed of, and believes that false time cards were prepared for the University's residents in Radiology at the VAMC, that said time cards were prepared during Dr. Hindo's sabbatical and bills based on said false time cards were submitted to the VAMC for payment through the University's fiscal services department, and that the VAMC paid the University's bills on the basis of said false time cards. On information and belief, the University, through its agents, knew that said time cards were false and fraudulent.

30. On or about April 7, 1990, Dr. Hindo advised the VAMC Associate Chief of Staff for Education, Conrad Swartz, M.D., and the University's Associate Dean, Mitchell Rhodes, M.D. of the suspected false time cards. Dr. Hindo also notified the VA Inspector General and the Secretary of Veterans Affairs about false time cards.

31. On April 17, 1990, Dr Hindo received a memorandum dated April 12, 1990 from the Defendants agent, Dr. Falk,

whereby Dr. Falk accepted Dr. Hindo's resignation as Chairman of the Department of Radiology, said resignation alleged to have been made in the letter dated February 7, 1990 to Dr. Winick. A true and correct copy of said memorandum is attached hereto as Exhibit "B".

32. Both before and after the date of the aforesaid memorandum purporting to accept Dr. Hindo's resignation, Dr. Hindo advised the University, Dr. Falk and Dr. Winick, that the letter of February 7, 1990 was not his formal resignation as chairman of the Department of Radiology, and, on the date of the Memorandum, April 12, 1990, each of the Defendant's knew that the letter of February 7, 1990 was not Dr. Hindo's resignation.

33. On July 3, 1990 and July 20, 1990, Marshall A. Falk, Defendant's dean and Executive Vice-President, threatened relator, Walid A. Hindo. M.D., with possible revocation of his faculty tenure unless he ceased interfering with Defendant's efforts to discharge him in violation of 31 U.S.C.A. section 3730 (h).

34. Thereafter, despite Dr. Hindo's protest, Defendants agents notified various university faculty and staff that Dr. Hindo had resigned, and convened a search committee to find a new Chairman of the Department of Radiology.

35. At no time did Dr. Hindo resign his position as the University's Chairman of the Department of Radiology, but, on August 2, 1990, the Defendant announced to all of the University's Deans, Department Chairmen and Department Heads that the University had selected a new Acting Chairman of the Department of Radiology, with the appointment effective immediately, thereby stripping Dr. Hindo of the position of Chairman of the Department of Radiology and effectively discharging him from his position.

Appendix I

36. The Defendant, through its agent, although claiming to have accepted Dr. Hindo's resignation, actually wrongfully discharged him as a direct result of his reporting suspected fraud committed by the University against the VAMC.

37. The Defendant's discharge of the relator, Dr. Hindo, for reporting suspected fraud against the VAMC was in violation of 31 U.S.C.A. Section 3730 (h).

38. Other acts of discrimination by Defendant include, but are not limited to, 1) threatened removal of Relators tenure status at UHS/CMS if Relator sought to enforce his rights; 2) denial and removal of the University clinical privileges at the McCormik Health Clinic, which resulted in loss if income to the Relator in the Universities private practice plan; 3) moving the Relators University classes to remote parts of the school so students could not possibly attend same; 4) denial of basic office supplies to Relators UHS/CMS department and confiscation of research equipment, including denial of access to the same equipment essential to his position; 5) loss of previously approved funding for a new applied imaging venture as well as earnings therefrom; 6) Failure to pick up the VAMC portion of Relators salary, after Realtors VMAC position will end as UHS/CMS does with other of its dual positioned employees; 7) denied Relator reimbursement for out of pocket expenses, including but not limited to, travel funds and societal dues relating to the continuing education requirement for maintaining Relators medical licensing; 8) denied Relator reappointments to academic assembly committee, admission committee, sabbatical committee, continuing education committee at UHS/CMS; 9) creating an atmosphere at UHS/CMS where at Relator was ostracized from colleagues whose support is essential to Relator in his efforts at obtaining grants as well as facilitation of a healthy work environment; 10) UHS/CMS failure to approve the

contractual agreement between Relator and Dr. Greenfield resulting in loss of position and earnings; 11) Defendants agents Marshall Falk, Gary Almy, along with Leonard Rogers of the VAMC conspired to remove Relator from his position as Chief of Radiology services at the VAMC by submitting false resignation documents to the central office of the VAMC; 12) Loss of secretarial services and office space at UHS/CMS; 13) loss of status and prestige, emotional distress, mental suffering and humiliation.

39. As a proximate result of Defendant's actions and discharge of the relator, Dr. Walid Hindo, in violation of 31 U.S.C.A. 3730 (h), Dr. Hindo has suffered a loss of his position at the University as Chairman of the Department of Radiology, and loss in earnings, employee benefits and retirement benefits associated with this position, as well as a loss of status and prestige, emotional distress, stress, mental suffering, embarrassment and humiliation.

WHEREFORE, the Relator, Walid Hindo, M.D. prays for judgment against the Defendant University as follows:

a. Reinstatement to his chairman position with the same seniority status he would have had but for the discrimination;

b. Two times the amount of back pay;

c. Interest on the back pay;

d. Compensation for special damages sustained as a result of his discrimination;

e. Litigation costs and reasonable attorney's fees;

f. Such other appropriate relief as the court deems just.

United States of America ex relator
Walid A. Hindo, Plaintiff

By: s/ Robert B. Ramirez
Robert B. Ramirez

Robert B. Ramirez
1141 Waukegan Road
Glenview, Illinois 60025
(708) 724-5582

APPENDIX J — STIPULATIONS OF FACT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 91 C 1432
Judge John F. Grady

United States of America ex rel. Walid A. Hindo,

Plaintiff,

v.

University of Health Sciences/The Chicago Medical School

Defendant.

STIPULATIONS OF FACT

1. Walid A. Hindo, M.D., the relator in this case is a tenured member of the University's faculty. In 1989, and for a part of 1990, he was the chairperson of the University's Department of Radiology. During that same time, he was also on the staff of the North Chicago Veterans Administration Medical Center ("NCVAMC").

2. The University is an Illinois not-for-profit corporation which operates a medical school located in North Chicago, Illinois which is adjacent to the NCVAMC. The University operates various residency training programs or affiliates with residency training programs operated by other facilities. Many residents in those programs rotate through the NCVAMC to receive part of their training.

3. On May 8, 1974, the University and the NCVAMC (then known as The Veterans Administration Hospital, Downey, Illinois) entered into a Memorandum of Agreement (Affiliation). (Joint Exh. 1.)

4. Under that Agreement, the University was responsible for organizing a Deans Committee composed of senior University faculty members. (Joint Exh. 1, p. 1.) In addition, the University was responsible for nominating "all physicians for residency or other training programs in the numbers and with the qualifications agreed upon by the Deans Committee and the Veterans Administration." (Joint Exh. 1, p. 1.)

5. The University and the NCVAMC entered into a Disbursement Agreement For House Staff Stipends and Fringe Benefits effective July 1, 1987 through June 30, 1991. (Joint Exh. 2.) Payments under this Disbursement Agreement were to be made in two steps: (1) estimated advance payments and, (2) final payments. (Joint Exh. 2, ¶ 8.)

6. On July 1, 1987, Mount Sinai and the University affiliated. (Joint Exh. 44.) Shortly after the July 1, 1987 affiliation, Mount Sinai and the University sought to convert the Mount Sinai residency program into a University sponsored program. (See Joint Exh. 7.)

7. On October 12, 1988, the VA Central Office advised NCVAMC that it would receive funding for 53.5 residency positions for the 1989-1990 academic year. (Joint Exh. 10.) This did not include funding for the two radiology residents sought by the NCVAMC. (Joint Exh. 10.)

8. On November 3, 1988, the VA Central Office in Washington acknowledged receipt of the NCVAMC appeal but

noted that the NCVAMC had made its appeal "after the deadline and after the decisions had been made regarding the final allocation." (Joint Exh. 12.) The Central Office placed the NCVAMC request on "our waiting list for temporary resident positions" and said that the NCVAMC request "would be acted upon as resources become available." (Joint Exh. 12.)

9. At the November 28, 1988 Deans Committee meeting, Dr. Gary Almy (the NCVAMC Chief of Staff) reported to the Committee that:

> "We are in touch with VACO to ensure that we get the two Radiology residency allocations that were not given to us. We hope to get them soon." (Joint Exh. 24.)

10. At its February 2, 1989, meeting the NCVAMC House Staff Review Committee "reviewed the case allocation for each service" and noted that the numbers "remained the same as last year." The minutes for that meeting also note the NCVAMC's efforts to obtain funding for two radiology residents:

> "We currently have two temporary Radiology Residency slots; for AY 1989-90, those positions are on a waiting list pending funding from Central Office. If we do not receive funding, the two Radiology positions will not be paid by the VA.
>
> There is a possibility that we could fill the radiology slots through the Navy Sharing Agreement. This will have to be explored." (Joint Exh. 15.)

Appendix J

11. The minutes of the March 27, 1989 Deans Committee meeting note that:

> "Notification has not been received yet on housestaff allocation for VAMC North Chicago. Only about 60 VAMCs nationwide will be reduced by one housestaff. The two temporary radiology positions will probably be firmed up in April." (Joint Exh. 25.)

12. As the minutes of the May 4, 1989 NCVAMC House Staff Review Committee report:

> *Unresolved Problems:*
>
> (1) 1989-1990 Allocation: Diagnostic Radiology — UHS/CMS [the University] accepted two residents into the radiology program, under the assumption that the VA would be receiving funds prior to July 1 and because the match process and commitments were made back in January. Education service will submit a written request to VACO for additional positions for AY 1989-1990. It is important for our medical center to have an active radiology residency program as an attraction in the recruitment of a new Chief, Radiology Service. If the VA does not receive supplemental funds to support these positions, we will ask the Medical Center Director for funding." (Joint Exh. 16.)

Appendix J

13. At the June 26, 1989 Deans Committee meeting, Dr. Conrad Schwartz (the Acting Chief of Education at the NCVAMC) reported that:

> "Funding has not been received for any of the temporary resident positions which were requested for VAMC North Chicago, nor has funding been received for any other VA medical center." (Joint Exh. 28.)

14. On July 9, 1990, David Barton (Chief of the NCVAMC Fiscal Service) sent John Gantz of the University a letter asking the University to refund $45,801.88 for the alleged overpayment. (Joint Exh. 66.) Mr. Barton asked Mr. Gantz to advise the NCVAMC "whether The Chicago Medical School prefers pay this Bill of Collection in full, or it prefers to have future payment of residents' salaries offset by $45,801.88." (Joint Exh. 6.)

Respectfully submitted,

s/ Alfred L. Knorr
One of the Attorneys
for Plaintiff

s/ Donna L. Marks
One of the Attorneys
for Defendant

Alfred L. Knorr
Robert B. Ramirez
Robert B. Ramirez, P.C.
1141 Waukegan Road
Glenview, Il 60015

Eric A. Oesterle
Donna L. Marks
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, IL 60606

APPENDIX K — TRIAL EXHIBIT 162 — VA PAID INVOICES FOR FOURTH QUARTER 1990 PAID BY VA ON NOVEMBER 16, 1990

[Omitted here but submitted separately as Lodging Appendix.]

APPENDIX L — FIRST AMENDED COMPLAINT FILED JANUARY 30, 1991 IN THE CIRCUIT COURT OF LAKE COUNTY — RETALIATORY DISCHARGE

IN THE CIRCUIT COURT OF LAKE COUNTY, ILLINOIS

90 CH 779

WALID A. HINDO, M.D.

Plaintiff,

v.

UNIVERSITY OF HEALTH SCIENCES/CHICAGO MEDICAL SCHOOL, MYRON WINICK, M.D., and MARSHALL A. FALK, M.D.,

Defendants.

FIRST AMENDED COMPLAINT

Now comes the plaintiff, Walid A. Hindo, M.D., (herein "Dr. Hindo"), by and through his attorney David F. Ryan, and complaining of the defendants, University of Health Sciences/ Chicago Medical School, Myron Winick, M.D., and Marshall A. Falk, M.D., (herein "University", "Dr. Winick" and "Dr. Falk", respectively), states as follows:

COUNT I

INJUNCTION AND DAMAGES BASED ON RETALIATORY DISCHARGE

1. The plaintiff, Walid A. Hindo, M.D., was employed by the defendant, University, as Chairman of the Department of Radiology from October 1981 until August 1, 1990.

Appendix L

2. The plaintiff, Dr. Hindo, was also employed by the Veterans Affairs Medical Center, North Chicago, Illinois, (herein "VAMC"), as Chief, Radiology Service from 1983 until his termination on October 1, 1990.

3. During the period July 1, 1989 to December 31, 1989, the plaintiff, Walid A. Hindo, M.D., was on a sabbatical from both of his aforesaid positions, and, upon his return from his sabbatical, resumed both of said positions.

4. The defendant, University, at all times mentioned herein, was located in the County of Lake, State of Illinois.

5. The defendant, Myron Winick, M.D., was the President of defendant, University, from January 1, 1990 to the present time.

6. The defendant, Marshall A. Falk, M.D., was the Dean and Executive Vice President of defendant, University, from on and before January 1, 1990 to the present time.

7. At all times mentioned herein, the VAMC had a continuing relationship with the University whereby the University scheduled its residents to work at the VAMC at certain scheduled times, and the VAMC paid the University for the residents' work.

8. On February 7, 1990, the plaintiff, Dr. Hindo, met with the defendant, Dr. Winick, and discussed Dr. Hindo's future plans. Said meeting took place at Dr. Winick's office, during which the parties discussed the possibilities of future special research projects for Dr. Hindo, which, if such projects were to occur, would be consideration for Dr. Hindo's future resignation

as Chairman of the Department of Radiology. Dr. Winick and Dr. Hindo agreed to pursue negotiations toward the goal of a final agreement by August 1, 1990.

9. During the aforesaid meeting, Dr. Winick prepared a letter addressed to Dr. Winick from Dr. Hindo, which his secretary typed on the University's letterhead, which set forth the agreement to pursue the negotiations which Drs. Winick and Hindo had discussed. At Dr. Winick's insistence, Dr. Hindo signed the letter. A true and correct copy of said letter is attached hereto as Exhibit A.

10. On or about April 2, 1990, Dr. Hindo discovered rampant absenteeism among residents in radiology at the VAMC, and notified the VAMC's Associate Chief of Staff for Education, Conrad Swartz, M.D., of said absenteeism. Conrad Swartz, M.D. was also a professor at the University and a member of its Dean's Committee.

11. On or about April 7, 1990, Dr. Hindo became informed of, and believes that false time cards were prepared for the University's residents in radiology at the VAMC, that said false time cards were prepared during Dr. Hindo's sabbatical and bills based on said false time cards were submitted to the VAMC for payment through the University's fiscal services department, and that the VAMC paid the University's bills on the basis of said false time cards. On information and belief, the University knew that said time cards were false and fraudulent.

12. On or about April 7, 1990, Dr. Hindo advised the VAMC Associate Chief of Staff for Education, Conrad Swartz, M.D., and the University's Associate Dean, Mitchell Rhoades, M.D., of the suspected false time cards. Dr. Hindo also notified the VA

Appendix L

Inspector General and the Secretary of Veterans Affairs about the suspected false time cards.

13. On April 17, 1990, Dr. Hindo received a memorandum dated April 12, 1990 from the defendant, Dr. Falk, whereby Dr. Falk accepted Dr. Hindo's resignation as Chairman of the Department of Radiology, said resignation alleged to have been made in the letter dated February 7, 1990 to the defendant, Dr. Winick. A true and correct copy of said memorandum is attached hereto as Exhibit B.

14. Both before and after the date of the aforesaid memorandum purporting to accept Dr. Hindo's resignation, Dr. Hindo advised the defendants, the University, Dr. Falk and D. Winick, that the letter of February 7, 1990 was not his formal resignation as Chairman of the Department of Radiology, and, on the date of the Memorandum, April 12, 1990, each of the defendants knew that the letter of February 7, 1990 was not Dr. Hindo's resignation.

15. Thereafter, despite Dr. Hindo's protest, the defendants notified various University faculty and staff that Dr. Hindo had resigned, and convened a search committee to find a new Chairman of the Department of Radiology.

16. On August 2, 1990, the defendants announced to all of the University's Deans, Department Chairmen and Department head that the University had selected a new Acting Chairman of the Department of Radiology, with the appointment effective immediately.

17. The defendants, although claiming to have accepted Dr. Hindo's resignation, actually wrongfully discharged him as a

direct result of his reporting of suspected fraud committee by the University against the VAMC.

18. The defendants discharge of the plaintiff, Dr. Hindo, for reporting suspected fraud against the VAMC in violation of federal law (18 U.S.C.A. Sec. 1001 and 18 U.S.C.A. Sec. 287) and Illinois law (Ill. Rev. STat., Ch. 144, Sec. 231) was a tortious wrongful discharge in contravention of this state's public policy.

19. As a proximate result of defendants' discharge of the plaintiff, Dr. Hindo, in violation of public policy, Dr. Hindo has suffered the loss of his position at the University as chairman of the Department of Radiology, the loss of his position at the VAMC as Chief, Radiology Services, and loss in earnings, employee benefits and retirement benefits associated with each of the aforesaid positions, as well as the loss of status and prestige, and emotional distress, stress, mental suffering, embarrassment and humiliation for which he has no adequate remedy at law.

Wherefore, the plaintiff, Walid A. Hindo, M.D., prays for judgment against the defendants the University, Dr. Winick and Dr. Falk, jointly and severally, as follows:

a. for a permanent, mandatory injunction requiring defendants to reinstate plaintiff, Dr. Hindo, as Chairman of the Department of Radiology;

b. for a mandatory injunction requiring defendants to notify the VAMC, in writing, that the plaintiff, Dr. Hindo, did not resign as Chairman of the Department of Radiology and has been reinstated to that position;

Appendix L

c. for compensatory damages for lost earnings, employee benefits, retirement benefits and emotional distress, mental suffering, embarrassment and humiliation; and

d. for punitive damages.

Count II

Intentional Interference With Plaintiff's Contract of Employment With The University

Now comes the Plaintiff, Walid A. Hindo, M.D., by his attorney David F. Ryan, complaining of the defendant, Myron Winick, M.D. states as follows:

20-35. The plaintiff, Dr. Hindo, realleges paragraphs 1 through 16 of Count I as paragraphs 20 through 35 of Count II.

36. At all times mentioned herein, the plaintiff, Dr. Hindo, had a valid and enforceable contract of employment with the defendant University, whereby Dr. Hindo was employed as the Chairman of the Department of Radiology.

37. At all times mentioned herein, the defendant, Dr. Winick, knew of the plaintiff's aforesaid contract of employment.

38. The defendant, Dr. Winick, knowing that the February 7, 1990 letter was not Dr. Hindo's resignation, intentionally and maliciously induced the defendants, the University and Dr. Falk, to breach the aforesaid contract of employment with Dr. Hindo by delivering the aforesaid letter to the University and Dr. Falk. Dr.

Winick maliciously intended the University and Dr. Falk to treat said letter as Dr. Hindo's unconditional resignation.

39. As a direct and proximate result of Dr. Winick's aforesaid wrongful conduct, the University and Dr. Falk breached the contract of employment and wrongfully discharged Dr. Hindo as Chairman of the Department of Radiology for his reporting of suspected fraud against the VAMC in violation of federal law (18 U.S.C.A. Sec. 1001 and Sec. 287) and Illinois law (Ill. Rev. Stat., Ch. 144, Sec. 231) which was in contravention of this state's public policy.

40. As a direct and proximate result of the aforesaid wrongful conduct, the plaintiff, Dr. Hindo, suffered the loss of his position at the University as Chairman of the Department of Radiology and loss of earnings, employee benefits and retirement benefits, as well as the loss of status and prestige, and emotional distress, stress, mental suffering, embarrassment and humiliation.

Wherefore, the plaintiff, Walid A. Hindo, prays for judgment against the defendant, Myron Winick, M.D., for compensatory and punitive damages in an amount in excess of $15,000, plus costs of suit.

Count III

Intentional Interference With Plaintiff's Contract of Employment With VAMC

Now comes the plaintiff, Walid A. Hindo, M.D., by his attorney, David F. Ryan, and, complaining of the defendants, University of Health Sciences/Chicago Medical School and Marshall A. Falk, M.D., states as follows:

Appendix L

41.-56. The plaintiff, Dr. Hindo, realleges paragraphs 1 through 16 of Count I as paragraphs 41 through 56 of Count III.

57. At all times mentioned herein, the plaintiff, Dr. Hindo, had a valid and enforceable contract of employment with the VAMC, whereby Dr. Hindo was employed as Chief, Radiology Services.

58. At all times mentioned herein, the defendants, University and Dr. Falk, knew of the plaintiff's aforesaid contract of employment.

59. The defendants, University and Dr. Falk, intentionally and maliciously induced the VAMC to breach the aforesaid contract of employment by notifying the VAMC that Dr. Hindo resigned from his position at the University as Chairman of the Department of Radiology, when the University and Dr. Falk knew that Dr. Hindo had not resigned.

60. As a direct and proximate result of the University's and Dr. Falk's aforesaid wrongful conduct, the VAMC breached the contract of employment and discharged Dr. Hindo as Chief, Radiology Services.

61. As a direct and proximate result of the aforesaid wrongful conduct, the plaintiff, Dr. Hindo, suffered the loss of his position at the VAMC as Chief, Radiology Services, loss of earnings, employee benefits, and retirement benefits, as well as the loss of status and prestige, and emotional distress, stress, menta suffering, embarrassment and humiliation..

Wherefore, the plaintiff, Walid A. Hindo, M.D., prays for judgment against the defendants, University and Marshall A.

Appendix L

Falk, M.D., for compensatory and punitive damages in an amount in excess of $15,000, plus costs of suit.

Walid A. Hindo,

by: s/ David F. Ryan
David F. Ryan, his attorney

David F. Ryan
39 South LaSalle Street
Suite 707
Chicago, Illinois 60603
(312) 726-5278

APPENDIX M — TRIAL EXHIBIT 33: LETTER DATED JULY 31, 1990 FROM PETER REGAN AT THE VA CENTRAL OFFICE IN WASHINGTON D.C. TO THE RELATOR WALID A. HINDO

Veterans Health Services
and Research Administration
Washington DC 20420

DEPARTMENT OF VETERANS AFFAIRS

JUL 31 1990

In Reply Refer to: (141)

Walid A. Hindo, M.D.
Professor and Chairman
Department of Radiology
University of Health Sciences/
Chicago Medical School
3333 Green Bay Road
North Chicago, IL 60064

Dear Dr. Hindo:

Your recent letter to Secretary Derwinski concerning a potential problem area at the North Chicago VA Medical Center has been referred to me for reply. I appreciated learning about the possibility that this facility has reimbursed the affiliated medical school inappropriately for two radiology residents. As you may be aware, your concern has already led the facility to a re-examination of its records for Academic Year 1989-90.

They discovered that they had paid for radiology residents

Appendix M

that were neither authorized nor funded by the Office of Academic Affairs (141). As a result, the Chicago Medical School has been requested to reimburse the North Chicago VA Medical Center the sum of $45,801.88. Please see the enclosed letter of July 9, 1990, from David Barton, Chief of Fiscal Service at North Chicago VAMC, to John Gantz at the Chicago Medical School.

Still to be examined are the records for the spring of 1989. I understand that Daphne Hare, M.D., Director of the Medical/ Dental Education Programs Service, is working with you and with the facility to resolve any remaining problems.

Please accept my personal gratitude for raising these concerns. It is such conscientious input as yours that enables us to administer a responsible health care system that offers quality services to the Nation's veterans.

Sincerely yours,

s/ Peter F. Regan, M.D.
Peter F. Regan, M.D.
Assistant Chief Medical Director
for Academic Affairs

Enclosures

APPENDIX N — TRIAL EXHIBIT 66: LETTER DATED JULY 9, 1990 FROM DAVID BARTON AT THE VA NORTH CHICAGO TO JOHN GANTZ AT THE UHS/ CMS WITH A BILL OF COLLECTION ATTACHED

July 9, 1990

556/04

John W. Gantz
University of Health Science
The Chicago Medical School
3333 Green Bay Road
North Chicago, IL 60064

Dear Mr. Gantz:

It has come to our attention that VA Central Office authorized neither positions nor funds for medical residents in Diagnostic Radiology for the Academic Year 1989-1990.

From July 1989 through March 1990 this facility paid salaries for Radiology residents as billed by The Chicago Medical School. Therefore, we must now issue the enclosed Bill of Collection totalling $45,801.88 for the months specified.

Please advise us whether The Chicago Medical School prefers to pay this Bill of Collection in full, or if it prefers to have future payment of residents' salaries offset by $45,801.88.

Sincerely Yours,

David E. Barton
Chief, Fiscal Service

Enclosure

Appendix N

BILL OF COLLECTION

[Omitted here but submitted separately as Lodging Appendix.)

APPENDIX O— TRIAL EXHIBIT 35: LETTER FROM WALID A. HINDO, THE RELATOR TO EDWIN DERWINSKI DATED JUNE 22, 1990

ATTACHMENT B

University of
Health Sciences/The Chicago
Medical School

Department of Radiology
Walid A. Hindo, M.D.
Professor and Chairman

3333 Green Bay Road
North Chicago, Illinois 60064-3095

Telephone
708.578.3345

June 22, 1990

Honorable Edward J. Derwinski, Secretary
Department of Veteran Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Dear Mr. Derwenski:

I am writing to you about the VA Inspector General's office's response to my efforts to get to the bottom of allegations that there has been fraud at the VAMC, North Chicago, and that the affiliated Chicago Medical School and Mount Sinai Hospital in Chicago also participated in that situation.

For some years, I have been Chairman of the Department of

Appendix O

Radiology at The Chicago Medical School and also Chief of Radiology Service at the VAMC, North Chicago. During 1989, I was on sabbatical from those positions. When I returned from sabbatical, I received allegations that, during my leave, the radiology residents rotating through the North Chicago VA Medical Center had rarely shown up to work at the VA though they were being paid (through The Chicago Medical School) by the North Chicago VA Hospital. I was told that, during my absence, the VA timekeeper was instructed to falsify time cards for the residents, their names attached, and the *total* amount of exams that they read for the entire year (attachment 1). I was also told that this arrangement was per the Program Director who works at Mount Sinai Hospital, Alan Hecht, M.D., and Gerald Leef, M.D., who was the Acting Chief of Radiology Services during my leave.

When these charges came to my attention, I sent three letters, copies of which are attached, to Dr. Hecht at Mount Sinai, in order to determine just what had taken place. (Dr. Leef has since resigned his VA position and is now employed by Mount Sinai.) To date, Dr. Hecht has declined to respond to my requests for information and verification.

This matter appears to involve relatively small amounts of funds (about $60,000/year). However, if these charges are true, those funds were paid by the VA to The Chicago Medical School for patient care in support of residents, which residents were then diverted from the VA in order to provide services for patients in a private hospital. [Indeed, those are other allegations that medical personnel practicing at Mount Sinai are still receiving VAMC, North Chicago payments, but not providing services to the VA for that.]

Appendix O

The Office of Education and Management was quite aware of the "absence of bodies to perform services" in Radiology throughout the year, but the audit representative of the VA's Inspector General failed to contact me about this matter. After that, and since my correspondence to Dr. Hecht at Mount Sinai produced no response, I reported our lack of progress in investigating these allegations to the Inspector General's office. To summarize, their response was that I should be careful and perhaps forget about pursuing this matter, especially in view of my having been recommended to become Chief of Staff at another VA facility (see letter attached).

I appreciate the Inspector General's office's concern about the possible adverse effect on my VA career of pursuing this. However, if the charges are true, then VA funds — and services which should have gone to VA patients — have been used by The Chicago Medical School and/or Mount Sinai Hospital to subsidize their own activities. If that occurred in the past, it should be corrected. If it is still taking place with other VA personnel who are receiving VA funds but not rendering services, that should be looked into. Finally, since our investigation here has been stymied by Dr. Hecht's declining to provide requested information, I do not want later criticism of me or VAMC, North Chicago that we ignored these allegations or attempted to cover them up or not investigate them.

Our office has now gone as far as we can in trying to get to the bottom of these charges. I would appreciate it if your office can do anything further to determine whether there is substance to these allegations of fraud.

Appendix O

Sincerely,

s/ Walid A. Hindo, M.D.
Walid A. Hindo, M.D.
Professor and Chairman, Department of Radiology, UHS/CMS
and
Chief, Radiology Service (114), VAMC, North Chicago

WAH: sc
Attachments

APPENDIX P — TRIAL EXHIBIT 70: LETTER FROM DAVID E. BARTON AT THE VA NORTH CHICAGO TO JOHN GANTZ AT UHS/CMS DATED NOVEMBER 15, 1990 SUSPENDING PAYMENTS TO THE UNIVERSITY FOR RADIOLOGY RESIDENTS

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
3001 Green Bay Road
North Chicago IL 60064-3096

November 15, 1990 In Reply Refax To: 556/04

John W. Gantz
University of Health Science
The Chicago Medical School
3333 Green Bay Road
North Chicago, IL 60064

Dear Mr. Gantz:

We enclose copies of your invoices for April, May and June 1990 with specific days and totals lined out. An explanation of our suspensions accompanies the invoices.

Sincerely Yours,

s/ David E. Barton
David E. Barton
Chief, Fiscal Service

Enclosure

Appendix P

COPIES OF SUSPENDED PAYMENTS FOR THE FOURTH QUARTER ACADEMIC YEAR 1989-1990

(Payments for Radiology Residents were suspended specifically because there was no funding for these positions.)

[Omitted here but submitted separately as Lodging Appendix.]

APPENDIX Q — TEXT OF PERTINENT STATUTES

Section 3729. False Claims

(a) LIABILITY FOR CERTAIN ACTS. — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(b) KNOWINGLY AND KNOWINGLY DEFINED. — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of

> the truth or falsity of the information; or
>
> (3) acts of reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

Section 3730(h):

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action of this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all the relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation cost and reasonable attorneys' fees . . .

Appendix Q

Title 18 U.S.C. 209(a) Salary of Government officials and employees payable only by the United States

> (a) Whoever receives any salary, or contribution to or supplementation of salary, as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any state, county or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection — shall be subject — to the penalties set forth in Section 216 of this title.

95-890

(3)

No. 95-890

Supreme Court, U.S.
FILED
JAN 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. WALID A. HINDO,

Petitioner,

vs.

UNIVERSITY OF HEALTH SCIENCES/
THE CHICAGO MEDICAL SCHOOL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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27 pp

QUESTIONS PRESENTED

1. Whether Respondent ("University") made a false claim under 31 U.S.C. § 3729 when it asked the North Chicago Veterans Administration Medical Center in North Chicago, Illinois ("NCVAMC") to reimburse it for the salaries and benefits paid by it to University affiliated radiology residents who worked at the NCVAMC during the 1989-90 academic year, but for whom the NCVAMC never obtained funding.

2. Whether the District Court abused its discretion when it denied Petitioner, Walid A. Hindo ("Hindo"), leave to file his Second Amended Complaint.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

REASONS FOR DENYING THE WRIT 5

I. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS ON THE QUESTIONS PRESENTED 5

II. THE UNIVERSITY DID NOT VIOLATE THE FALSE CLAIMS ACT 8

III. THE TRIAL COURT PROPERLY DENIED HINDO LEAVE TO FILE HIS SECOND AMENDED COMPLAINT 10

CONCLUSION 12

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Abbott Labs v. Portland Retail Druggists Ass'n, 425 U.S. 1 (1976) 7

Heckler v. Community Health Services, 467 U.S. 51 (1984) 7, 8

Hindo v. University of Health Sciences/The Chicago Medical School, 237 Ill. App. 3d 453, 604 N.E.2d 463 (2d Dist. 1992), *appeal denied*, 149 Ill. 2d 649, 612 N.E.2d 513 (1993) 2

Sanders v. Venture Stores, Inc., 56 F.3d 771 (7th Cir. 1995) 11

United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) 6, 7

United States ex rel. Walid A. Hindo v. University of Health Sciences/The Chicago Medical School, 65 F.3d 608 (7th Cir. 1995) ..... *passim*

Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) 6

Young-Montenay, Inc. v. United States, 15 F.3d 1040 (Fed. Cir. 1994) 6, 7

STATUTES AND RULES

31 U.S.C. § 3729 ..... 1, 5, 6, 8

31 U.S.C. § 3730 ..... 1, 2

SUP. CT. R. 10 5

FED. R. CIV. P. 41(a) 3

FED. R. CIV. P. 52(c) 3, 4

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, University of Health Sciences/The Chicago Medical School (n/k/a Herman M. Finch University of Health Sciences/The Chicago Medical School) ("University"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case. That decision is reported at 65 F.3d 608 (1995) and is reprinted in Petitioner's Appendix ("PA"). (PA 1a-14a.)

OPINIONS BELOW

The Seventh Circuit's decision affirmed the District Court's November 29, 1994 judgment in favor of the University at the close of Hindo's case at trial, and the District Court's November 3, 1993 Minute Order denying Hindo's motion for leave to file his Second Amended Complaint. The District Court's opinions are reprinted in PA 15a-29a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions involved. The statutes involved, 31 U.S.C. §§ 3729 and 3730, are quoted in the Appendix attached to this Brief at A1-A11.

STATEMENT OF THE CASE

On March 8, 1991, Walid A. Hindo ("Hindo") filed a two count complaint against the University. He alleged in Count I that the University violated the False Claims Act when it

sought from NCVAMC reimbursement of the salaries and benefits paid by the University to radiology residents who worked at the NCVAMC during the 1989-90 academic year, but for whom funding had not previously been approved by the Veterans Administration. Count II, dismissed with prejudice at Hindo's request on the first day of trial, alleged that the University submitted to the NCVAMC false time records for those same radiology residents.

As required under the False Claims Act (31 U.S.C. § 3730(b)(2)), Hindo filed his complaint *in camera* under seal and served a copy of it upon the United States Government. The Government had sixty days to "elect to intervene and proceed" with the action. 31 U.S.C. § 3730(b)(2). The Government subsequently notified the District Court pursuant to 31 U.S.C. § 3730(4)(B) that it declined to take over the action. That gave Hindo the right under 31 U.S.C. §§ 3730(4)(B) and (c)(3) "to conduct the action." Hindo's complaint was then unsealed and served upon the University in late November, 1992.

On July 29, 1993, Hindo filed an amended complaint adding a new count (Count III) alleging that the University violated 31 U.S.C. § 3730(h) by threatening to terminate Hindo's tenure and by discharging Hindo from his position as chair of the University's Department of Radiology for reporting the University's supposed fraudulent billing to the NCVAMC. The University moved to dismiss Count III on September 22, 1993 on the grounds that Hindo's Count III claims were barred by his unsuccessful prior state court litigation against the University for retaliatory discharge, *Hindo v. University of Health Sciences/The Chicago Medical School*, 237 Ill. App. 3d 453, 604 N.E.2d 463 (2d Dist. 1992), *appeal denied*, 149 Ill. 2d 649, 612 N.E.2d 513 (1993).

On November 3, 1993, after the October 31, 1993 discovery cutoff date and while the University's motion to dismiss was pending, Hindo sought leave to file his Second Amended Complaint adding additional allegations of harassment by the University in "retaliation" for Hindo's reporting of the alleged fraudulent billing. The University objected, and, on November 3, 1993, District Court Judge John F. Grady denied Hindo leave to file his Second Amended Complaint. (PA 22a-23a.) On December 7, 1993, Judge Grady granted the University's motion to dismiss Count III "due to the preclusive effect of the judgment on Hindo's state retaliatory discharge claim." (PA 29a.)

At the outset of the November 21, 1994 bench trial, Hindo moved to dismiss Count II pursuant to FED. R. CIV. P. 41(a). (Tr. 2-3.) The trial court granted that motion with prejudice, and the trial proceeded only on Count I. (Tr. 3.) After the parties made their opening statements, Judge Grady asked the parties to research some legal issues relating to Count I and adjourned the proceedings until the next morning.[1] (Tr. 39-41, 47.)

The next morning, after the parties reported on their research, Judge Grady elected to proceed under FED. R. CIV. P. 52(c). Specifically, he directed the parties to present their

---

[1] Hindo's assertion that Judge Grady "interrupted the trial, making a 12(b)(6) motion to dismiss *sua sponte*" (Petition, p. 4) is wrong. Because Hindo dropped Count II, which contained the only allegations that the University knowingly submitted invoices for work that had not been performed, the complexion of the case changed drastically. (Tr. 45.) It was against this background that Judge Grady asked the parties to research issues to "iron out the legal question before we spend time taking evidence." (Tr. 45.) Hindo's own counsel agreed that there was "no sense" in taking evidence until that research was completed. (Tr. 45-46.)

evidence on the issues of whether the University's invoices were false, and what the University and the NCVAMC knew about the status of VA funding for the radiology residents when the University invoiced the NCVAMC for the radiology residents' salaries and benefits. (Tr. 69-72.) At the close of Hindo's case, the University moved for a directed verdict under Fed. R. Civ. P. 52(c) because the evidence at trial and applicable law confirmed that the University had not made any false claims. Judge Grady granted that motion and entered judgment for the University. (PA 15a-18a.) Hindo then appealed.

STATEMENT OF FACTS

The University disagrees with Hindo's statement of facts. The University incorporates in this Brief the Seventh Circuit's statement of facts. *Hindo*, 65 F.3d at 610-12. Accordingly, only two matters require further examination: (1) Hindo's assertion that the NCVAMC made its request for a refund from the University "in direct response to Hindo's letter" to the Veterans Administration (Petition, p. 5); and (2) Hindo's conclusory statements as "fact" that the University engaged in various acts of retaliation (Petition, pp. 6, 25-26).

The evidence at trial confirmed that the NCVAMC requested a refund from the University as the result of its own internal investigation, not in response to Hindo's letter to the VA. (*See, e.g.*, Tr. 337-38.) The Seventh Circuit agrees. *Hindo*, 65 F.3d at 612.

The allegations of retaliation by the University all come from Hindo's proposed Second Amended Complaint, the very same Complaint that Judge Grady denied Hindo leave to file.

(*See* PA 22a-23a, 26a-29a.) Hindo did not testify at trial and there is no trial testimony or evidence to support any of these claimed "facts."

REASONS FOR DENYING THE WRIT

Despite being given the chance to intervene in and take over this *qui tam* case, the United States Government elected not to do so. This case does not raise any constitutional issues. There is no conflict between the Seventh Circuit's decision below and any decisions of this Court or of other Courts of Appeals.

Hindo's Petition raises no important legal issues. Instead, the Petition merely asserts that the decisions below make erroneous factual findings or misapply properly stated rules of law. Rule 10 of this Court provides that a petition for a writ of certiorari is "rarely granted" in such cases. This is not the rare case that warrants a writ of certiorari.

Moreover, the decisions below were correct.

I. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS ON THE QUESTIONS PRESENTED.

The False Claims Act provides liability to one who "knowingly presents" to the United States Government "a false or fraudulent claim for payment." 31 U.S.C. § 3729(a). To meet the definition of "knowingly," Hindo must

demonstrate that when the University claimed monies due from the NCVAMC, it:

> (1) had actual knowledge of the falsity of the information at issue;
>
> (2) acted in deliberate ignorance of the truth or falsity of that information; or
>
> (3) acted in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b).

"The phrase 'known to be false' . . . does not mean 'scientifically untrue'; it means 'a lie.' The Act is concerned with ferreting out 'wrongdoing,' not scientific errors." *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992). The cases cited by Hindo agree with this standard. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (intent requires "deliberate ignorance" or "reckless disregard"); *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994) (same standard; defendant admitted knowledge of falsity of claim). This is the same standard followed by the Seventh Circuit in its decision below. *Hindo*, 65 F.3d at 613.

Hindo attempts to manufacture a conflict between the Seventh Circuit's decision and decisions of this Court and other Courts of Appeals. However, the cases that he cites as evidence of such a conflict are not inconsistent in any way with the Seventh Circuit's decision.

For example, Hindo cites *Hagood* for the proposition that the government's knowledge is irrelevant under the False Claims Act. (Petition, p. 22.) But, that case does not say that. When reviewing the dismissal of a complaint for failure to

state a claim, the *Hagood* Court held that the government's knowledge does not automatically bar an action under the False Claims Act. *Hagood*, 929 F.2d at 1421. However, once the case proceeds beyond the complaint stage, the government's "knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth." *Id.* That is entirely consistent with how the courts below ruled in this case. *Hindo*, 65 F.3d at 613-14.

Young-Montenay, Inc. v. United States, 15 F.3d 1040 (Fed. Cir. 1994), also relied on by Hindo as evidence of a conflict among the courts, is inapplicable. In that case, a contractor admittedly submitted a claim for more than he was then owed on the project to get bigger payments at the beginning of the project (a practice known as "front-end loading"). *Young-Montenay*, 15 F.3d at 1042-43. Here, on the other hand, there was no evidence that any of the amounts claimed by the University were front-end loaded. Instead, the evidence here showed that none of the information on the invoices at issue was false and that the radiology residents performed valuable services while at the NCVAMC. *Hindo*, 65 F.3d at 613-14.

Hindo also cites two decisions by this Court in the "Reasons for Granting the Writ" section of his Petition. (Petition, p. 10.) The first, *Abbott Labs v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976), is a Robinson-Patman Act case, not a False Claims Act case. And, it is never mentioned again in the Petition. The second, *Heckler v. Community Health Services*, 467 U.S. 51 (1984), dealt with a claim by a health care provider that the government was estopped from denying it reimbursement for medicare funds. The provider claimed that statements made to it by an employee of a

company which administered the program bound the government to provide benefits to the provider. *Heckler*, 467 U.S. at 55-57. This case, on the other hand, is not an estoppel case.

In sum, there is no conflict. The Seventh Circuit properly followed well-established parameters for determining liability under the False Claims Act. Petitioner's disappointment with the lower courts' results does not arise from any conflict between the courts. Rather, it results from Petitioner's belief that the decisions below were based upon misguided findings of fact. That does not justify the issuance of a writ of certiorari.

II. THE UNIVERSITY DID NOT VIOLATE THE FALSE CLAIMS ACT.

The University's invoices to the NCVAMC were "claims" under Section 3729(c) of the False Claims Act. Therefore, the issue here is whether those claims were false and, if so, did the University know they were false when it submitted them to the NCVAMC. Because the invoices contained no false information, Hindo was forced to argue that those invoices contained false implied representations that the NCVAMC had in fact procured funding for the two radiology residents included in the invoices. As the Seventh Circuit stated, however, this argument "fails because it distorts the record produced at trial and misapprehends the law." *Hindo*, 65 F.3d at 613.

The evidence at trial confirmed that the University's belief that the NCVAMC would obtain funding for the radiology residency positions for the 1989-90 academic year was reasonable. Those positions had been funded for the previous academic year. The NCVAMC wanted the radiology residents

to continue at the NCVAMC in the 1989-90 academic year. The District Court found, and the Seventh Circuit agreed, that the NCVAMC repeatedly told the University that it hoped to get the funds and was pursuing a number of alternatives for doing so. *Hindo*, 65 F.3d at 611-12. Even in June, 1989 (well after the University had committed to hire two additional radiology residents to fill the NCVAMC positions), the parties remained hopeful that funding would ultimately be procured. *Id.* at 612. Indeed, prior history confirmed that such funding could have been procured even after the start of the 1989-90 academic year. (*Id.*; Tr. 179.)

The University stipulated at trial that it was advised on several occasions that the NCVAMC had not, as of the dates of those communications, obtained funding for the radiology residents.[2] (Tr. 71-72.) The University, however, was not told until July, 1990, when the NCVAMC first asked for a refund, that the NCVAMC had not in fact obtained such funding. (Tr. 182, 270.)

When the radiology residents reported to the NCVAMC radiology service in July, 1989, nobody at the NCVAMC told them or the University that they were unwelcome, unauthorized or unfunded. Instead, the NCVAMC, the very party having the most accurate information as to the status of funding, allowed the residents to rotate through the NCVAMC, recorded their time, forwarded its time records to the University, processed the invoices and paid the University $45,801.88 for the residents' services.

---

[2] Hindo overstates the University's stipulations at trial. The University never stipulated that when it submitted its invoices, it knew that the NCVAMC had not procured funding. (Tr. 71-72; PA 42a-46a.)

In the end, the NCVAMC got a big windfall. The University refunded, to the penny, the $45,801.88 that the NCVAMC paid for reimbursement of the radiology residents' salaries and benefits. It did so even though the NCVAMC received valuable services and other benefits from those residents throughout the entire 1989-90 academic year. The bottom line is that the NCVAMC truly got something for nothing.

The irony here is that relator, now claiming to represent the very party who got something for nothing, asserts that the free benefits conferred upon the NCVAMC give rise to a false claim. The NCVAMC has suffered no loss. Hindo has no claim.

III. THE TRIAL COURT PROPERLY DENIED HINDO LEAVE TO FILE HIS SECOND AMENDED COMPLAINT.

This is not a *res judicata* case. In his brief, Hindo "concedes that the retaliatory demotion alleged in the Lake County case is barred by *res judicata* in this case." (Petition, p. 24.) However, Hindo argues that his "harassment, and other acts of discrimination" allegations are "new and different cause[s] of action." (Petition, p. 26-27.) But, those allegations of harassment all come from Hindo's proposed Second Amended Complaint that Judge Grady denied Hindo leave to file.

Thus, the proper issue, and the one examined by the Court of Appeals below, was whether the trial court abused its discretion in denying Hindo leave to amend his Second Amended Complaint. Hindo's Petition does not address that issue. Thus, Hindo offers no explanation of why he waited until after the close of discovery to seek leave to file his

Second Amended Complaint. Extensive discovery had already taken place, and the alleged "facts" at issue had been known to Hindo for some time. Judge Grady was well within his discretion to reject Hindo's belated Second Amended Complaint. *See Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773-74 (7th Cir. 1995) (citations omitted) (denial of motion for leave to amend a complaint reviewed for abuse of discretion).

As the Seventh Circuit stated at 65 F.3d at 615:

> A denial is particularly warranted in instances in which the plaintiff has failed to provide an explanation as to why the amendment did not take place sooner, and where the delay in granting the motion to amend would cause delay and burden the parties. [citation omitted] This is Hindo's case. Hindo (and other plaintiffs) are advised to take note of our admonition in *Sanders*, 56 F.3d at 775 (quoting William Shakespeare, Twelfth Night, II 42.), "In delays there lies no plenty."

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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§ 3729. False claims

(a) **Liability for certain acts.** – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.** – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **Claim defined.** – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure.** – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

§ 3730. **Civil actions for false claims**

(a) **Responsibilities of the attorney general.** – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons.** (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to Qui Tam actions. – (1)** If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff. – **(1)** If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not

more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue to action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. – (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official

if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section[1] paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.** – The Government is not liable for expenses which a person incurs in bringing an action under this action.

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[1] So in original. See 1990 Amendment note.

(g) **Fees and expenses to prevailing defendant.** – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, limitation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(As amended Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162.)

(2)

No. 95-890

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. WALID A. HINDO,

Petitioner,

vs.

UNIVERSITY OF HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL AND FINCH UNIVERSITY OF HEALTH SCIENCES: THE CHICAGO MEDICAL SCHOOL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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13 pp

TABLE OF CONTENTS

	Page
Further Reasons for Granting the Writ	1
I. The Seventh Circuit opinion in this case conflicts with other Circuit Court opinions and decisions of the Supreme Court.	1
II. False claims liability should have been imposed in this case.	4
III. The trial court abused its discretion in denying petitioner leave to file his second amended complaint, which contained additional retaliatory acts under 31 U.S.C. § 3730(h) which should not have been barred by *res judicata*. ...	8
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Abbott Labs v. Portland Retail Druggist Ass'n, 425 U.S. 1 (1976)	2
Heckler v. Community Health Services, 467 U.S. 51 (1984)	3
Rainwater v. United States, 356 U.S. 590 (1958)	3
United States v. Griswold, 24 F. 361 (D. Ore. 1885) ...	3

Contents

Page

United States v. Neifert-White Co., 390 U.S. 228 (1968) 3

United States ex rel. Haggod v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) 4

United States ex rel. Hindo v. Univewrsity of Health Sciences/The Chicago Medical School, 65 F.3d 608 (1995) 4

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 3

Young-Montenay v. United States, 15 F.3d 1040 (Fed. Cir. 1994) 1, 2, 5

Statutes Cited:

18 U.S.C. § 209 3

31 U.S.C. § 3729 ..... 2, 3, 9

31 U.S.C. § 3729(b) 4, 5

31 U.S.C. § 3730(h) 8

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT OPINION IN THIS CASE CONFLICTS WITH OTHER CIRCUIT COURT OPINIONS AND DECISIONS OF THE SUPREME COURT.

Respondent asserts there is no conflict with the decisions of this Court or other circuits on the questions presented. (*See* Respondent's Brief, p. 5) This is simply not the case. The Seventh Circuit opinion in this case directly conflicts with the decision in *Young-Montenay v. United States*, 15 F.3d 1040 (Fed. Cir. 1994). The *Young Montenay* case is remarkably similar to the case before this Court. Both cases deal with contractors submitting inflated claims to the government. In both cases the contractor is submitting claims to the Veterans Administration.

In *Young-Montenay* the contractor entered into a contract to perform certain renovations to VA boiler equipment. Pursuant to this contract, Young-Montenay agreed to purchase a burner package for the renovation at a price of $104,000. Subsequently, a dispute arose as to whether the burner package would be a complete package and whether Young-Montenay would eventually owe $153,000 for a complete burner package for the renovation. The contractor submitted the inflated amount ($153,000) to obtain a progress payment. The court held Young-Montenay liable under the false claims act for front-loading and inflating amounts due. The court stated *it was immaterial that Young-Montenay would subsequently owe $153,000 for a complete burner package, for at the time of submission of the invoice to the VA Young Montenay knew they owed only $104,000 for the burner package.*

In this case it is stipulated that the respondents, at the time they submitted the invoices, knew there was no funding from

VACO for the radiology residents at issue in this case and submitted invoices for the radiology residents notwithstanding this knowledge. The University did not even have a contract for these two radiology residents. In *Young-Montenay* at least they had a valid contract with the VA for the burner package at $104,000. The Seventh Circuit places great weight on the fact that the University had a reasonable expectation of receiving funding in the future. However, under the *Young-Montenay* case UHS\CMS had to bill the VAMCNC based upon information known to them at the time they submitted the invoice. At all relevant times it was stipulated that the University knew there was no funding for these positions and therefore no amounts properly due for their services.

In short, the University should have waited until they knew they had funding for the positions before they billed the VA. By billing the VA for inflated amounts for the services of the radiology residents the respondents violated the False Claims Act. This Court must send a clear message to government contractors that they must bill the government based upon information known to them at the time they bill and that if they issue inflated claims to the government they may be liable under the False Claims Act for civil penalties. In this case under *Young-Montenay*, it is irrelevant that the University may have received funding at a later date and in this case the funding never occurred and respondent repaid amounts it already wrongfully billed and collected. In conclusion, on this point, there definitely seems to be a split of authority on the treatment of the knowing submission of inflated invoices under the False Claims Act.

Additionally, respondent's brief states *Abbott Labs v. Portland Retail Druggist Ass'n*, 425 U.S. 1 (1976), is a *Robinson-Patman* case but in the case the Court stated that courts have always construed the False Claims Act broadly because it is a remedial statute. (*See* 425 U.S. at 12). Perhaps Justice Black stated this proposition more eloquently when he wrote:

> The [False Claims] statute is a remedial one. It is intended to protect the treasury against the hungry unscrupulous host that encompasses it on every side, and should be construed accordingly.

(*United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943) quoting *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885). This liberal construction of the False Claims Act has also been established in other Supreme Court cases as well. (*See Rainwater v. United States*, 356 U.S. 590, 592 (1958), and *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Since the Seventh Circuit opinion narrowly interprets the provisions of the False Claims Act, it conflicts with construction of the Act as applied in all of the above-cited Supreme Court cases and therefore should be reviewed by this Court.

Similarly, *Heckler v. Community Health Services*, 467 U.S. 51, at 63 (1984) was cited because the Supreme Court said, "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law. . . . Those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law." In this case the University was seeking public funds and must be held to this standard. Gary Almy was the chief of staff at the VAMCNC, he was also being paid by the University as associate dean for Veterans Affairs. Congress enacted a Rule, 18 U.S.C. § 209 which prohibits public employees from receiving additional compensation from private sources. Almy certified the invoices for payment knowing the radiology residents did not receive funding. Almy abetted UHS\CMS in submitting and certifying the invoices for payment. The University can not therefore rely on the knowledge of the VAMCNC and their acts to escape liability.

II.

FALSE CLAIMS LIABILITY SHOULD HAVE BEEN IMPOSED IN THIS CASE.

Perhaps, the most burning issue is the standard under amended 31 U.S.C. § 3729 (b) after the False Claims Amendment Act of 1986. In their analysis the Seventh Circuit first cites *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F. 2d 1416, 1420 (9th Cir. 1991), for the proposition that innocent mistakes or negligence are not actionable under this section. (*United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608 (1995), Petitioner's Appendix A, p.9(a)).

In the case at bar however, their is no innocent mistake or just negligence. The fourth quarter bills were submitted to the Veterans Administration Medical Center North Chicago in November, 1990 after the VAMCNC had told the University in July 1990 that there would be no payment for radiology residents salaries for the academic year 1989-1990 that ends on June 30, 1990 because VACO did not approve funds for the salaries of the radiology residents to be reimbursed to the University. This is clearly communicated to John Gantz the Vice President of Finance at the University, who supervises the controller at the University. There was also a bill of collection issued on July 9,1990 and Gantz agreed to an offset in the fourth quarter bills of the amounts wrongfully paid to the radiology residents in November of 1990 when the fourth quarter bills were to be paid by the VAMCNC.

In July 1990 the evidence shows the University had been told flatly there would be no funding for these positions, that the University had agreed to repay the amounts already paid and they agreed to offset this amount against the salary reimbursement for

the positions that did receive funding from VACO. The University at the very least was submitting claims for payment when it had actual knowledge of the falsity of the information and knew it to be false which definitely meets the standard outlined in 31 U.S.C. § 3729(b). It can also be said that with respect to all the invoices, the University is acting in deliberate ignorance of the truth or falsity of the information contained in the invoices or that the submission of the invoices were acts of reckless disregard for the truth or falsity of the information contained in the invoices with respect to the radiology residents. This was not scientific error, this was a lie. The first three quarter billings of radiology residents were also not scientific errors, since the University knew they did not have funding authorization at the time they submitted the invoices. Accordingly, these are also lies and false claims liability should have been imposed in this case.

The Seventh Circuit opinion mentions that Dr. Rhodes, an Associate Dean at UHS\CMS, relied on Victor Wahby, who was an educational specialist from VAMCNC and transferred to Washington VACO in early 1989, who allegedly stated that UHS/CMS should hire the radiology residents because funding would become available. However, on Dr. Wahby's direct examination he said he never told anyone to contract for the positions and as a general rule whenever North Chicago came forth with questions concerning their allocation he would take himself out of the picture. (Transcript, p. 331). Even if Dr. Rhodes was entirely correct concerning what Wahby said about future funding, which appears from Waby's testimony to be erroneous, UHS\CMS can not rely on the possibility of funding in the future to currently bill the VA for the radiology resident position under the *Young-Montenay* analysis.

Page 6 of the respondent's brief in opposition sets forth the standard under § 3729(b) of the False Claims Act but conveniently leaves out the last line in the statute that says, "and

no proof of specific intent to defraud is required." This is important because the Seventh Circuit opinion seems to indicate on page 11(a) of the Appendix that some form of deceit, skullduggery or fraudulent motive is required by the University before false claims liability may be imposed. This Court needs to address this possible interpretation of the Seventh Circuit opinion.

Respondent's Brief on page 9 states that the University was not told that until July 1990, when the VAMCNC asked for a refund that the VANCMC had not in fact obtained such funding. First, the trial record is clear that no one at the VAMCNC or VACO ever told the University that they received funding for the radiology resident positions at issue in this case. Second, there was a plethora of documentation that was part of the stipulation of facts in this case (Appendix J, numbers 7-14) where the University was notified through the Deans Committee and their Associate Dean for Graduate Medical Education, Dr. Mitchell Rhodes, who attended the Deans Committee meetings that discussed the final allocation for the academic year 1989-90 for residence positions approved for funding was 53.5 residency positions. This allocation did not include funding for the two radiology residents. On November 3,1988, the VAMCNC was notified that the appeal made for the two positions was received too late and they would be placed on a waiting list. All of these communications unambiguously stated the VAMCNC had not obtained funding for the positions and the University was informed of these facts. All of these stipulated facts show affirmatively that the University knew they lacked funding at the time they submitted the invoices for payment from the VA. Yet, the University's brief states that Petitioner overstates the stipulations at trial. This assertion is erroneous.

In the case at bar it is stipulated that several corporate officers of UHS\CMS including but not limited to the Dean of the

Medical School, Marshall Fall, Associate Dean for Veterans Affairs, Gary Almy, and Associate Dean for Graduate Medical Education Mitchell Rhodes all knew of the lack of funding for the radiology residents at issue in this case. (Transcript, pp. 78-79, 126, 128, 132, 133, 135, 136, 198, 217) These agents of UHS/ CMS attended Deans Committee Meetings and House Staff Affairs Committee wherein the lack of funding for the radiology residents was discussed. (Trial Exhibits, 15-17). All of the evidence and testimony in this case showed affirmatively the University knew they did not have funding for these positions prior to July 1990 and they had this knowledge at the time they submitted the invoices.

The respondent attempts to argue that the VA received a big windfall from the University. This assertion ignores the fact that the University is already receiving over 1.6 million dollars annually from the VA to reimburse the University for the salaries of medical residents that rotate through the VAMCNC. (*See* Appendix K, Trial Exhibit 162, fourth quarter invoices from the University to the VA where over $400,000 in residency salaries are paid by the VA to UHS\CMS). In this case 1.6 million was not enough support for the University's residency programs though, they needed to bill $55,933.81 more for radiology residents. (*See* Plaintiff's fourth amended complaint, paragraph 7) of which $45,801.88 was paid and collected by the University. In July 1990 they agreed to offset the $45,801.88 wrongfully paid, however even after the agreement, the University billed the VA $10,131.93 additionally for radiology residents in the fourth quarter that was never paid by the VA. If there is any irony here it is that the University now claims that the VA obtained a windfall. If anyone obtained a windfall from this relationship it was the University to the extent of 1.6 million dollars. It is also ironic that false claim defendants frequently give the government something for nothing when they are caught with their hand wrongfully in the till of the United States treasury. Secondly, the

University, by operating the residency programs, kept their accreditation with the American Medical Association, which without such accreditation, the medical school could have problems recruiting students.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER LEAVE TO FILE HIS SECOND AMENDED COMPLAINT, WHICH CONTAINED ADDITIONAL RETALIATORY ACTS UNDER 31 U.S.C § 3730(h) WHICH SHOULD NOT HAVE BEEN BARRED BY *RES JUDICATA*.

Additionally, respondent's brief indicates the trial court properly denied Hindo leave to file his second amended complaint. The trial court actually abused its discretion in failing to allow petitioner leave to file its second amended complaint with additional retaliatory acts alleged. The complaint was filed within the six year statute of limitations. It properly related back to the original filing of the complaint since Judge Grady had previously given petitioner leave to file a Count III, alleging retaliatory acts by respondents. There were also reasons conveyed as to why the amendment was not filed sooner. The reason was that counsel found out about the additional retaliatory acts after respondents filed their motion to dismiss, when he sat down to discuss the issues contained in the motion to dismiss with his client. At this point the relator had already been through three days of deposition testimony in which many of the retaliatory acts alleged were discussed. The motion was filed before the end of discovery. The case was not tried until over a year after the motion came before the court. Since the case took so long to go to trial the respondents were not prejudiced by the amendment. Further, petitioner requested leave the same date to extend discovery. It was also denied, even though trial took place over a

year later. It was a case of hurry up, prepare a case for trial, then wait over a year.

Further, if you view the case from a relator's viewpoint, he does not have the expertise to know what is an illegal act under the retaliation provisions of the False Claims Act, especially in a case such as this, where he has already lost in state court which may justify these retaliatory acts in his mind. There was no reason not to permit the amendment under these facts.

Lastly, the respondents allege that this is not a *res judicata* case. This is another misconception the respondents have. The record will show there were allegations in the first amended complaint alleging harassment that were not contained in the Lake County case that Judge Grady clearly stated were barred by *res judicata*. (*See* Appendix H). The petitioner alleges these allegations of harassment were new and separate causes of action not barred by *res judicata*.

CONCLUSION

To protect the treasury against contractors that knowingly submit inflated claims to United States governmental entities, the petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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